

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS.

CR. NO. 15-4268 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8 VOLUME 1

9 Transcript of Motion to Suppress Proceedings and
10 James Hearing before The Honorable James O. Browning,
United States District Judge, Las Cruces, Dona
11 County, New Mexico, commencing on January 8, 2018.

12 For the Government: Ms. Maria Armijo; Mr. Randy
Castellano; Mr. Matthew Beck

13 For the Defendants: Mr. Brock Benjamin; Ms. Cori
14 Harbour-Valdez; Mr. Pat Burke; Mr. Robert Cooper; Mr.
James Castle; Mr. Jeff Lahann; Mr. Orlando Mondragon;
15 Mr. John Granberg; Mr. Scott Davidson; Ms. Amy Jacks;
Mr. Richard Jewkes; Ms. Amy Sirignano; Mr. Marc
16 Lowry; Ms. Theresa Duncan; Ms. Carey Bhalla; Mr.
William Maynard; Mr. Donovan Roberts; Ms. Lisa
17 Torracco; Ms. Angela Arellanes; Mr. Jerry Walz

18 For the Defendants (Via telephone): Ms. Justine
19 Fox-Young; Ms. Margaret Strickland

20 For the Witness Eric Duran: Mr. Ken Del Valle
21
22
23
24
25

1 THE COURT: All right. Good morning
2 everyone. I appreciate everyone making themselves
3 available to me this morning. I appreciate y'all's
4 patience this morning. I'm running a little behind
5 trying to get some other fires put out.

6 I'm going to go ahead and call court and
7 get entries of appearances since we haven't been
8 together in a while. So United States of America
9 versus Angel DeLeon, Criminal Matter No. 15-4268 JB.

10 If counsel will enter their appearances for
11 the Government.

12 MS. ARMIJO: Good morning, Your Honor.
13 Maria Armijo, Randy Castellano, and Matthew Beck on
14 behalf of the United States.

15 THE COURT: Ms. Armijo, Mr. Castellano, Mr.
16 Beck, good morning to you.

17 And for Defendant Joe Lawrence Gallegos.

18 MR. BENJAMIN: Good morning, Your Honor.
19 Brock Benjamin.

20 THE COURT: Mr. Benjamin, good morning to
21 you.

22 And for Defendant Edward Troup?

23 MS. HARBOUR-VALDEZ: Good morning, Your
24 Honor. Cori Harbour-Valdez and Pat Burke for Edward
25 Troup. And our paralegal, Raquel Rodriguez, is on

1 the phone.

2 THE COURT: All right. Mr. Gallegos, I
3 meant to say hello to you this morning as well.

4 And Ms. Harbour-Valdez, Mr. Burke, Mr.
5 Troup, good morning for you.

6 THE DEFENDANT: Good morning, Your Honor.

7 THE COURT: And then for Defendant Billy
8 Garcia.

9 MR. CASTLE: Jim Castle and Bob Cooper on
10 behalf of Billy Garcia, who is present.

11 THE COURT: All right. Mr. Cooper, Mr.
12 Castle, Mr. Garcia, good morning to you.

13 THE DEFENDANT: Good morning, Your Honor.

14 THE COURT: And for Defendant Allen
15 Patterson.

16 MR. LAHANN: Good morning, Your Honor.
17 Jeff Lahann on behalf of Mr. Patterson.

18 THE COURT: Mr. Lahann, good morning to
19 you. Mr. Patterson, good morning to you.

20 THE DEFENDANT: Good morning, Your Honor.

21 THE COURT: And for Mr. Christopher Chavez.

22 MR. MONDRAGON: Good morning, Your Honor.
23 Orlando Mondragon and John Granberg on behalf of
24 Mr. Chavez.

25 THE COURT: Mr. Mondragon, Mr. Granberg,

1 Mr. Chavez, good morning to you.

2 And for Arturo Arnulfo Garcia.

3 MR. DAVIDSON: Good morning, Your Honor.

4 Scott Davidson on behalf of Mr. Garcia. Mr.

5 Blackburn may be joining us later this week, but not
6 for the next couple of days.

7 THE COURT: Mr. Davidson, Mr. Garcia, good
8 morning to you.

9 And for Daniel Sanchez.

10 MR. JEWKES: Good morning, Your Honor.

11 Richard Jewkes, Amy Jacks, and Daniel Sanchez, who is
12 present before the Court.

13 THE COURT: All right. Mr. Jewkes,
14 Ms. Jacks, Mr. Sanchez, good morning to you.

15 And for Anthony Ray Baca?

16 MR. LOWRY: Good morning, Your Honor. Marc
17 Lowry and Theresa Duncan on behalf of Anthony Ray
18 Baca, who is present in the courtroom.

19 THE COURT: Mr. Lowry, good morning to you.
20 Ms. Duncan, good morning to you. Mr. Baca, good
21 morning to you.

22 THE DEFENDANT: Good morning, Your Honor.

23 THE COURT: And for Defendant Christopher
24 Garcia.

25 MS. SIRIGNANO: Good morning, Your Honor.

1 Amy Sirignano and Cynthia Gilbert on behalf of
2 Christopher Garcia. Mr. Adams is in D.C. today.
3 He'll be joining us tomorrow.

4 THE COURT: All right. Ms. Sirignano,
5 Ms. Gilbert, and Mr. Garcia, good morning to you.

6 I hope it's warmer in D.C. than when I left
7 there on Friday. It was cold.

8 For Carlos Herrera.

9 MR. MAYNARD: Good morning, Your Honor.
10 Bill Maynard and Carey Bhalla for Mr. Herrera.

11 THE COURT: All right. Mr. Maynard, Ms.
12 Bhalla, and Mr. Herrera, good morning to you.

13 And for Defendant Rudy Perez.

14 MR. VILLA: Good morning, Your Honor. Ryan
15 Villa on behalf of Mr. Perez, who is present. Ms.
16 Fox-Young is joining us on the phone.

17 THE COURT: All right. Mr. Villa, Mr.
18 Perez, good morning to you. And Ms. Fox-Young, are
19 you present?

20 MS. FOX-YOUNG: Yes. Good morning, Your
21 Honor.

22 THE COURT: Good morning to you, Ms.
23 Fox-Young.

24 And for Defendant Andrew Gallegos.

25 MR. ROBERTS: Good morning, Your Honor.

1 Donovan Roberts and Lisa Torracco on behalf of Mr.
2 Andrew Gallegos.

3 THE COURT: All right. Mr. Roberts, Ms.
4 Torracco, good morning to you. Mr. Gallegos, good
5 morning to you.

6 And for Defendant Shauna Gutierrez.

7 MS. ARELLANES: Good morning, Your Honor.
8 Angelina Arellanes for Ms. Gutierrez, who appears in
9 person.

10 THE COURT: All right. Ms. Arellanes, Ms.
11 Gutierrez, good morning to you.

12 THE DEFENDANT: Good morning.

13 THE COURT: And for Defendant Brandy
14 Rodriguez.

15 MR. WALZ: Good morning, Your Honor. Jerry
16 Walz for Brandy Rodriguez, and she's present, Your
17 Honor.

18 THE COURT: All right. Mr. Walz, good
19 morning to you. Ms. Rodriguez, good morning to you.

20 THE DEFENDANT: Good morning.

21 THE COURT: All right. The first issue
22 that I think we need to address is going to be the
23 sealed third motion to withdraw as counsel and
24 motion -- well, let me just deal with it up here at
25 the bench. Why don't I have Mr. Mondragon, Mr.

1 Granberg, and Mr. Chavez come up here. And it will
2 be a little bit of issue there for the -- and I
3 assume the Government has seen this -- don't have any
4 objections to this?

5 MS. ARMIJO: No, Your Honor. We are aware
6 of the circumstances.

7 THE COURT: All right.

8 SEALED BENCH PROCEEDINGS WERE HELD - NOT TRANSCRIBED

9 (The following proceedings were held in
10 open court.)

11 THE COURT: All right. We're back in open
12 court. Ms. Wild, on this next motion, is there any
13 problem in discussing it in open court?

14 THE CLERK: No, sir.

15 THE COURT: So, Ms. Sirignano, I think this
16 is your motion, and I'm not fully versed in it. But
17 my understanding is that because of what the marshal
18 has told you, nobody has custody of the witness
19 you're subpoenaing. So I think what Ms. Wild told me
20 when I left Albuquerque yesterday is that what she
21 anticipated was this motion being withdrawn today.
22 Am I accurate in where we are?

23 MS. SIRIGNANO: Judge, I'm not entirely
24 sure. I did get a call from Ms. Wild this morning.
25 I understand that Mr. Montoya is still in custody

1 because he has a federal detainer. But he's out on
2 some kind of bond from the State of Colorado, but
3 pending Rule 5 proceedings, I think, up in Colorado
4 to come into federal custody. So I'm not entirely
5 sure, Judge.

6 THE COURT: Well, do you want to hold off,
7 then, on your motion till things clear up, to see
8 whether this is the motion you need granted or you
9 need another motion? If he's not in state custody,
10 which is the way that I thought this was all drafted
11 up, was that it would writ him out of state custody
12 in here. Am I wrong?

13 MS. SIRIGNANO: No, Judge, you're not
14 wrong. I just don't know where he is, honestly.
15 I've talked to Michael Keefe, his federal defender.
16 And I tried to get some information from the
17 Government. I filed that as a placeholder to make
18 sure that he came this week. So if I have to
19 withdraw that, I'm happy to do that. I just need
20 some assurances from either the Marshal Service or
21 the Government that we'll have access to him either
22 this week or prior to trial, so we have him able to
23 testify before the 29th, Judge.

24 THE COURT: All right. Well, any thoughts
25 on what you can say about Mario Montoya?

1 MS. ARMIJO: Yes, Your Honor. The last
2 email I had from Ms. Sirignano indicated that she was
3 perfectly aware of his whereabouts. In fact, she
4 indicated that -- a slam to the Government, she was
5 aware of the circumstances of his arrest, or of his
6 custody status in an email to Mr. Keefe. My
7 understanding is he is in state custody with a
8 federal detainer.

9 He had bonded out -- he tried to bond out
10 of his state charges, to make his way down here. But
11 I think the parties were forgetting that he had to
12 deal with the Rule 5 issue. So on Friday night, we
13 were looking into the Rule 5 issue.

14 THE COURT: Educate me a little bit.

15 MS. ARMIJO: He had to be initialed on his
16 federal warrant for pretrial release violation. So
17 he's in state custody. And he was bonding out. He
18 wanted to bond out to come down here, because he
19 knows he's needed down here. And so that was why he
20 was bonding out, to try and get here. But he needs
21 to go before a Colorado judge.

22 Royce, who has moved with the U.S.
23 Marshal's Office up there, was going to assist us in
24 getting us to court quickly. But the problem is, as
25 of late Friday, the bondsman had not finished the

1 paperwork so he could be taken physically into
2 federal custody, because he was still technically in
3 state custody. My understanding is that possibly
4 over the weekend or this morning -- I don't have an
5 update -- that bondsman is going to go through with
6 the paperwork. And I believe Royce is worked as
7 quickly as he can to get him into federal custody,
8 take him to a judge up here.

9 Mr. Keefe, his attorney, knows the
10 situation. We're hoping that he can convey over
11 there in Colorado to waive his identity hearing, at
12 which point the U.S. Marshal's Office and the FBI
13 will work quickly to get him here.

14 That being said, he can be here possibly
15 tomorrow, or Wednesday. We just need more
16 information on what's happening up there. And we
17 will try to work with that. So he's kind of in
18 limbo. He's not -- he's bonded out or trying to bond
19 out of state custody at this very moment. I don't
20 know what the situation is. And the federal detainer
21 will immediately go into effect.

22 THE COURT: Well, is that enough of an
23 assurance to you? It seems to me that maybe, rather
24 than me gumming up the works up in Colorado by
25 issuing an emergency writ right now, which then could

1 delay, or follow up him getting transferred to
2 federal custody, shall we just hold off a little bit
3 on this motion until we get some visibility of what's
4 going on up there?

5 MS. SIRIGNANO: Absolutely, Judge. The
6 only reason I filed that was a placeholder to get him
7 down here. So if he's going to be in federal
8 custody. And I know Royce Namoca. I can give him a
9 call, too, and get a status from him.

10 THE COURT: Why don't I just hold this?

11 MS. SIRIGNANO: Yes, Your Honor.

12 THE COURT: If things clear up, let me
13 know. And I may ask you to withdraw this motion so
14 it clears our docket up.

15 MS. SIRIGNANO: Sure, Judge.

16 THE COURT: But we'll just keep it in place
17 at the present time. Does that work for you?

18 MS. SIRIGNANO: Yes, Judge. Thank you.

19 THE COURT: Thank you. Ms. Wild, I know
20 this is going to be an impossible question to ask
21 you, but do you know where I put my materials on this
22 Eric Duran colloquy? Do you know?

23 THE CLERK: It should have been under tab
24 number 3. Are they not there?

25 THE COURT: Well, it's showing up just as

1 an empty -- well, hold on.

2 THE CLERK: I can send it along pretty
3 quickly if you need me to.

4 THE COURT: My memory was -- and correct me
5 if I'm wrong -- you and I talked about a big stack of
6 material. I'm showing about an inch thick, maybe it
7 was a little less. And I'm just seeing a few pages
8 here. Did we decide that I wouldn't bring those
9 here?

10 THE CLERK: That's correct. You should
11 have an outline and two waivers.

12 THE COURT: And Ms. Armijo, I was handed
13 something this morning. Did y'all file a response to
14 this motion this morning? Is that the one that I got
15 the motion on?

16 MS. ARMIJO: No. I believe you're talking
17 about the conflict. I believe Mr. Lowry filed
18 something late last night.

19 THE COURT: Okay. So that's not --

20 THE CLERK: The motion, Judge, that was
21 originally filed is -- or the notice that the
22 Government submitted is not in that stack. But it's
23 at Document 1534.

24 THE COURT: Say that again.

25 THE CLERK: The Government's notice of this

1 potential conflict is not in that stack of materials
2 you have. But it can be located at Document 1534.
3 You've read it, and looked at it previously in early
4 December.

5 THE COURT: Okay. So that wasn't something
6 that was filed today.

7 THE CLERK: That's Document -- I believe --
8 1613, that was filed last night. That's the
9 defendant's response to that Government's notice.

10 THE COURT: All right. Since we have Mr.
11 Del Valle here and Mr. Duran here, why don't we go
12 ahead and take up that issue. I'm not sure that I
13 have the materials in front of me about the conflict,
14 so I may have to be rereminded, reeducated as to what
15 the issue is. So somebody want to start? All I have
16 is materials to try to do a colloquy. But I don't
17 have any materials to remind me what the conflict is.

18 MR. CASTELLANO: Judge, just to get things
19 started off then, the conflict, or potential conflict
20 involved the fact that Mr. Duran had previously sued
21 the Department of Corrections.

22 THE COURT: So this was the civil matter?

23 MR. CASTELLANO: Yes, sir. So the Court --
24 I think there was transcripts and other documents
25 presented at the last meeting. That issue is related

1 to the suit, and Mr. Lowry's firm previously
2 representing Mr. Duran.

3 THE COURT: All right. So it sounds like
4 where we were was I was going to have a colloquy with
5 Mr. Duran, and make sure he was comfortable with Mr.
6 Lowry and his firm continuing to represent Mr. Baca
7 in this case; is that correct?

8 MR. CASTELLANO: That's correct, Your
9 Honor. And I guess one of the questions will be the
10 extent and the length of the representation. It may
11 have been longer than we initially thought. But
12 that's correct, we're at that point, I believe.

13 THE COURT: Well, why don't I get started
14 on this colloquy. And then, Mr. Castellano, if you
15 want to weigh in and make sure that you're
16 comfortable with what we're doing.

17 Mr. Del Valle, how are you today?

18 MR. DEL VALLE: Doing well.

19 THE COURT: Good. And, Mr. Duran, good
20 morning to you.

21 THE DEFENDANT: Good morning, Your Honor.

22 THE COURT: All right. So, Mr. Duran, do
23 you have a sense as to why you're here today and what
24 we're about to do?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: So I if understand the
2 situation, is that Mr. Lowry's firm -- not Mr. Lowry,
3 but someone else in his firm -- represented you in a
4 civil action involving the Department of Corrections.
5 Is that your memory of the case? You may know more
6 about it than I do. I have read some material on it,
7 but it's been a while. But do you remember that?

8 THE DEFENDANT: Correct.

9 THE COURT: And so you understand that what
10 we're doing here is, you have new counsel, you have
11 Mr. Del Valle, which the Court has appointed to
12 represent you in this matter. So we're trying to
13 make certain you're comfortable with Mr. Lowry, who
14 is with the Rothstein Firm, going ahead and
15 representing Mr. Baca in this case. So you
16 understand what we're doing here this morning?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: All right. Let me explain a
19 few things to you, to make sure that we understand
20 exactly what I'm going to be asking you some
21 questions about. Do you understand that you have a
22 right to a conflict-free counsel? Do you understand
23 you have that right?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: And do you understand what that

1 means, that you have a right to a counsel that is
2 solely devoted to your interests, and nobody else's;
3 they're not going to be worried about themselves,
4 they're not going to be worried about anybody else,
5 but just you? Do you understand you have that right?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: And do you understand the facts
8 surrounding Mr. Lowry's firm's previous
9 representation of you, and that it was, as far as I
10 can tell, an unrelated civil case? Do you understand
11 all the circumstances there?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Do you have any questions that
14 you want to ask me about that case, or that you want
15 to ask -- anything you want to ask Mr. Del Valle or
16 Mr. Lowry about that prior case? Or do you feel like
17 you know what the Rothstein Firm was representing you
18 on?

19 THE DEFENDANT: I just feel like them
20 representing me would be a conflict of interest, as
21 far as me being a witness in this case.

22 THE COURT: Okay. So am I hearing you that
23 you're not planning to waive your conflict here?

24 THE DEFENDANT: Correct.

25 THE COURT: Okay. And is that your

1 understanding as well, Mr. Del Valle, that he's not
2 going to be waiving his representation?

3 MR. DEL VALLE: Yes, Your Honor. I spoke
4 to my client, Mr. Duran, and he doesn't feel
5 comfortable being cross-examined by somebody -- or
6 another attorney who previously represented him.

7 THE COURT: Okay. All right.

8 Mr. Lowry, I guess I had understood it was
9 going to be different; that Mr. Duran was going to
10 waive. Is my memory off, or was this what we were
11 anticipating when we were talking earlier?

12 MR. LOWRY: Your Honor, I hate to say that
13 your memory is off, but indeed it is; that we never
14 anticipated that Mr. Duran was going to waive his
15 conflict.

16 Our argument on December 7 to Your Honor is
17 that there is no conflict. There is not even the
18 potential, or even the possibility of a conflict. As
19 we discussed on the 7th, once we realized that
20 Mr. Duran was going to be a witness in this case, we
21 immediately assigned all duties to Mr. Duran to Ms.
22 Duncan, who is co-counsel, who is conflict-free in
23 this situation.

24 So Mr. Duran's concern that he would be
25 cross-examined by any member of the Rothstein Firm

1 would be incorrect. That will not happen. So I
2 mean, we can walk through -- and I apologize about
3 the filing last night, Your Honor, but it just echoes
4 the argument we made on the 7th, that, as you just
5 pointed out, these are completely unrelated cases,
6 and there is really no overlap.

7 And if you look at the Rules of
8 Professional Conduct, Rule 16-109(a), in particular,
9 I mean, has to be a same or substantially similar
10 matter. And they're neither in this case.

11 The United States' motion that brought this
12 to the Court's attention pointed out -- I thought in
13 writing this response a bit of an incongruity in the
14 record, if you will. The response seems to intimate
15 in Footnote 7 -- I mean, the United States' motion,
16 Document No. 1534, in Footnote 7, seems to indicate
17 that Mr. Duran is going to testify in this case about
18 being an SNM member and SNM Gang-related activities.
19 And the problem is, Your Honor, there is no
20 indication that he was ever an SNM member until, at
21 best, 2005. And that's by his own admission in the
22 February 19, 2015 interview we heard about at the
23 very last hearing we had in this case in December.
24 So there is really no overlap. There is
25 no -- even if you considered that Mr. Donatelli, who

1 is in a different office, in a different city, had
2 attorney-client confidential information regarding
3 Mr. Duran, that would be an entirely unrelated
4 matter. It would be of no utility or no usefulness
5 in this case.

6 Again, as you know from the last meeting, I
7 haven't talked to Mr. Donatelli about this. You
8 directed Ms. Duncan to talk to Mr. Donatelli about
9 this. I have the letter that was attached to the
10 pleading last night, Your Honor. If you want, I can
11 provide you with a copy.

12 THE COURT: Well, is that what -- I've been
13 handed now the response to the United States' motion.
14 Is it attached to that document?

15 MR. LOWRY: Yes, Your Honor. I believe it
16 would be Exhibit E.

17 THE COURT: Well, let me ask Ms. Wild a
18 question. If Mr. Duran was not going to waive his --
19 any conflict here, what was the thinking about
20 setting this hearing up to go through any sort of
21 colloquy with Mr. Duran?

22 THE CLERK: Do you have your cellphone on
23 the bench?

24 THE COURT: I do.

25 THE CLERK: Let me call you.

1 (A discussion was held off the record.)

2 THE COURT: All right. Well, let me do
3 this: I want to read -- it seems to me that we've
4 now determined that Mr. Duran is not going to waive
5 any conflict here. So, I apologize, there may not
6 have been any reason to bring Mr. Duran here to the
7 courtroom for that purpose. And so -- but at least
8 we have it clear that he's not going to waive.

9 At some point, I'm going to need to do a
10 colloquy with Mr. Baca. But I think that before I do
11 a colloquy, I want to read the response of Mr. Lowry,
12 the Rothstein Firm, and educate myself a little bit
13 more so that my colloquy with Mr. Baca is a little
14 bit more informed.

15 So I'm going to put that aside. We'll just
16 plow ahead. And I won't make any decisions on that
17 at the present time. So unless somebody has
18 something else to propose here, I'm inclined to let
19 Mr. Del Valle and Mr. Duran leave the courtroom.

20 Mr. Castellano?

21 MR. CASTELLANO: Your Honor, I don't have
22 any objection to that approach. Mr. Lowry had said
23 that, according to Mr. Duran's statements in his
24 prior interview, that he may not have been an SNM
25 Gang member at that time.

1 But I believe the representation continued
2 for a number of years. So the representation may
3 have pushed into the time when he says he was an SNM
4 member. And so what we don't know, and what maybe
5 the Court can delve into with Mr. Duran, is the
6 nature of any conversations, any privileged
7 conversations he had with counsel; for example,
8 anything that would have tied to gang activities,
9 such as drug trafficking or any administrative
10 trouble he may have gotten into during that time when
11 he was represented. Because that may be reflected in
12 his STIU file. So I agree with the Court's approach.
13 I just think there may be other things we'll have to
14 flesh out as part of the colloquy.

15 THE COURT: Well, since I'm letting
16 Mr. Duran go, it seems to me that if those are the
17 sort of questions that before he leaves that we ought
18 to do today?

19 MR. CASTELLANO: It wouldn't hurt to at
20 least talk about the length of the representation,
21 and without asking him about what the conversations
22 were, whether certain topics, for example, were
23 discussed during that time.

24 THE COURT: Well, why don't you turn around
25 and why don't you ask Mr. Duran those questions. Mr.

1 Del Valle, you're obviously counsel, you can make
2 objections if you want. And let me see what Ms.
3 Duncan wants to say before --

4 MS. DUNCAN: Your Honor, I'm sorry, before
5 the Government talks to him, may I ask that he be
6 placed under oath. It's a serious topic so I think
7 he should be under oath.

8 THE COURT: All right. So I'll place you
9 under oath. But again, if Mr. Del Valle wants to
10 talk to you or make an instruction to you, then you
11 know, let Mr. Del Valle talk to you before you answer
12 a question. But I'm going to place you under oath.
13 If you'll raise your right hand to the best of your
14 ability, Mr. Duran, Ms. Standridge will swear you in
15 at this time.

16 ERIC PRESTON DURAN,
17 after having been first duly sworn under oath,
18 was questioned and testified as follows:

19 DIRECT EXAMINATION

20 THE CLERK: Please state your name for the
21 record.

22 THE WITNESS: Eric Preston Duran.

23 THE COURT: All right. Mr. Castellano.
24 Mr. Duran.

25 Why don't we do this: Mr. Duran, why don't

1 you come up to the witness box and be seated. Mr.
2 Del Valle, why don't you come up. We have a seat up
3 here. I didn't mean to take your seat away from you.
4 We can get another one here. Does that work for you?

5 All right. Mr. Castellano.

6 BY MR. CASTELLANO:

7 Q. Good morning, Mr. Duran.

8 A. Good morning, sir.

9 Q. Can you please tell the Court approximately
10 when the Donatelli law firm began representing you in
11 the civil matter?

12 A. 1997.

13 Q. And do you remember approximately how long
14 that representation lasted; in other words, when did
15 they stop representing you on that case?

16 A. 2005.

17 Q. Now, after 2005, did you have any other
18 communications with the law firm, or did they
19 otherwise represent you?

20 A. I did -- like, short brief conversations
21 with them and contact.

22 Q. And approximately how much longer then did
23 you have contact with the firm? In other words,
24 approximately what year?

25 A. Till about 2007.

1 Q. And during that time, without telling us
2 what the communications were, what the conversations
3 were, do you know if you had conversations with the
4 law firm about anything that touched on what the SNM
5 does in terms of gang activity?

6 A. As far as when they represented me?

7 Q. Yes.

8 A. Yeah, several things.

9 Q. So, in other words, in terms of any
10 conversations you had with the law firm, could some
11 of those conversations come up in court in terms of
12 things you discussed with them?

13 A. They could.

14 Q. And the same question involving any
15 disciplinary matters. Did you have any discussions
16 with the law firm about any disciplinary matters you
17 were facing or faced during that representation?

18 A. I did.

19 Q. I don't know if you know the answer to this
20 question, but would you know if those matters would
21 be represented in your STIU or other corrections
22 files?

23 A. I'm not aware.

24 Q. Okay. I'm going to try get into some
25 topics. Once again, without asking you about what

1 the conversations were, but in terms of topics, can
2 you tell the Court if you discussed anything related
3 to drug activity?

4 A. Drug activity, yes, we did.

5 Q. With the law firm?

6 A. With the law firm.

7 Q. Can you tell the Court whether you had any
8 discussions with the law firm involving any acts of
9 violence?

10 A. I did.

11 Q. And to the best of your recollection, when
12 did your conversations with the law firm cease
13 entirely?

14 A. Around 2007.

15 Q. You've had a chance to see Mr. Lowry today.
16 Do you remember him at all?

17 A. I do.

18 Q. How do you remember him?

19 A. I've seen him before in court dates, or
20 Donatelli's office.

21 Q. Can you tell the Court whether or not you
22 had any of these privileged conversations with Mr.
23 Lowry?

24 A. No, I haven't.

25 Q. So you recognize him from the firm, you've

1 seen him, but your conversations did not involve
2 Mr. Lowry; is that correct?

3 A. Right.

4 Q. And other than Mr. Donatelli, did you have
5 conversations such as these with any other lawyers in
6 the firm?

7 A. I believe I spoke to everybody that was in
8 that firm at this time that they represented me.

9 Q. Do you remember any other names?

10 A. I don't recall.

11 Q. Do you remember approximately how many of
12 the attorneys from the firm you spoke with about this
13 representation?

14 A. Approximately 10.

15 Q. And do you remember which office they were?
16 For example, were they in the Santa Fe office, or the
17 Albuquerque office, or another office?

18 A. Both.

19 MR. CASTELLANO: May I have a moment, Your
20 Honor?

21 THE COURT: You may.

22 MR. CASTELLANO: Thank you, Your Honor. I
23 pass the witness.

24 THE COURT: Thank you, Mr. Castellano.

25 Ms. Duncan, do you want to ask any

1 questions of Mr. Duran?

2 MS. DUNCAN: I do, Your Honor.

3 THE COURT: Ms. Duncan.

4 EXAMINATION

5 BY MS. DUNCAN:

6 Q. You testified that the Donatelli firm
7 stopped representing you in 2005; correct?

8 A. Correct.

9 Q. Your lawsuit, civil lawsuit you filed
10 against Wackenhut, was dismissed in 2002; correct?

11 A. It wasn't dismissed.

12 Q. I'm going to mark -- I think I might be on
13 Exhibit A. Anthony Baca --

14 THE COURT: Let's just treat this as a
15 separate matter. I don't think we had any testimony
16 on it before, unless my memory is off.

17 MS. DUNCAN: Thank you, Your Honor.

18 THE COURT: All right. That's Defendant's
19 Exhibit A?

20 MS. DUNCAN: Your Honor, may I approach?

21 THE COURT: You may.

22 Q. I'm showing you what has been marked as
23 Anthony Baca A. Can you take a look at that document
24 and tell me if you've seen that before?

25 MS. DUNCAN: Your Honor, while the witness

1 is reviewing the document, I understand the
2 Government has no objection, and we would introduce
3 it for purposes of this hearing.

4 THE COURT: All right. Has it been
5 sufficiently identified so that everybody knows what
6 it is?

7 All right. No objection from the
8 Government?

9 MR. CASTELLANO: That's correct.

10 THE COURT: Any objection from anybody
11 else? All right. Anthony Baca's Exhibit A will be
12 admitted into evidence.

13 BY MS. DUNCAN:

14 Q. Do you recognize that document?

15 A. No, I don't.

16 Q. Do you recognize the caption of that
17 document?

18 A. I do.

19 Q. Is that the lawsuit that you filed against
20 Wackenhut?

21 A. Yeah.

22 MS. DUNCAN: May I approach the witness
23 again?

24 THE COURT: You may.

25 Q. I've got it now here on the Elmo. And this

1 document is entitled, "Order of dismissal with
2 prejudice; correct?

3 A. Correct.

4 Q. And, again, I think you've agreed that this
5 is filed in the case of Eric Duran versus Wackenhut
6 Corrections Corp, et al.; correct?

7 A. Correct.

8 Q. And this is the lawsuit that the Donatelli
9 firm represented you in?

10 A. Right.

11 Q. There was no other lawsuit filed after this
12 one by the Donatelli firm?

13 A. No.

14 Q. And if you look at the bottom of that
15 paragraph it says -- it reads, "All causes of action
16 therein" -- I'll start here: "Eric Duran and the
17 attorneys for certain of the defendants here are
18 praying for entry of an order dismissing the
19 complaint for damages for deprivation of civil rights
20 and for supplemental state law claims filed herein by
21 said plaintiff, and all causes of action therein with
22 prejudice as to all defendants named in the
23 aforementioned complaint on the grounds" -- and I'm
24 skipping over -- "on the grounds that the matters in
25 controversy have been fully settled and compromised,

1 and the Court, having read the pleadings and being
2 sufficiently advised in the premises, finds that the
3 Court has jurisdiction over the parties and the
4 subject matter herein, and that said motion to
5 dismiss is well taken and should be granted."

6 Did I read that correctly?

7 A. Correct.

8 Q. The last paragraph, "It is therefore
9 ordered, adjudged, and decreed that the complaint for
10 damages for deprivation of civil rights and for
11 supplemental state law claims filed herein by said
12 plaintiff, and all causes of action therein be, and
13 the same hereby are, dismissed with prejudice as to
14 all defendants named in the aforesaid complaint for
15 damages for deprivation of civil rights and for
16 supplemental state law claims."

17 Did I read that correctly?

18 A. Yes, ma'am.

19 Q. So you testified that you had contact with
20 the firm until 2007; correct?

21 A. Correct.

22 Q. And you indicated that you spoke to
23 approximately ten lawyers in the firm?

24 A. At the time, during testimony, yes.

25 Q. When you say, "at the time, during

1 testimony," what do you mean?

2 A. When I testified against the correctional
3 officers that assaulted me.

4 Q. You did that in a criminal case; correct?

5 A. During trial, yes.

6 Q. Yes. And when you talk about meeting with
7 lawyers, you were meeting with members of the U.S.
8 Attorney's Office; correct?

9 A. No, the lawyers from Donatelli's firm.

10 Q. You never met with a lawyer from the U.S.
11 Attorney's Office to the prepare to testify in the
12 criminal case?

13 A. In the criminal case, I did, yes.

14 Q. But when you're talking about testifying,
15 you're talking about the criminal case; correct?

16 A. Yeah.

17 Q. You never testified in the civil case?

18 A. I testified -- no.

19 Q. So when you met to prepare for your
20 testimony in the criminal case, it was also with
21 members of the U.S. Attorney's Office; correct?

22 A. And Donatelli's firm, yes.

23 Q. How often did you meet with the U.S.
24 Attorney's Office to prepare?

25 A. Once or twice.

1 Q. And Mr. Donatelli was always there?

2 A. Correct.

3 Q. Where did you meet?

4 A. In a private room at the courthouse.

5 Q. Did you ever meet at Donatelli's office?

6 A. Yes.

7 Q. When did you meet at Mr. Donatelli's
8 office?

9 A. I don't recall dates.

10 Q. Approximately when did you meet with Mr.
11 Donatelli in his office?

12 A. During the beginning of this whole civil
13 suit.

14 Q. And was that the office in Santa Fe?

15 A. Santa Fe and Albuquerque.

16 Q. Approximately how many times did you meet
17 with Mr. Donatelli at his office?

18 A. Just maybe once or twice.

19 Q. And you said that was at the beginning of
20 the lawsuit?

21 A. Correct.

22 Q. Who was present with Mr. Donatelli?

23 A. People that represented his firm.

24 Q. Do you remember any of their names?

25 A. I don't.

1 Q. You said that you had conversations with
2 Mr. Donatelli regarding disciplinary matters;
3 correct?

4 A. Correct.

5 Q. When did you have those conversations?

6 A. At the beginning of the civil matters.

7 Q. So that would have been in 2001; is that
8 correct?

9 A. 1998.

10 Q. Did you discuss those matters with Mr.
11 Donatelli other than at the beginning of the
12 litigation in 1998?

13 A. Throughout his whole representation.

14 Q. So are you saying every time you talked to
15 Mr. Donatelli you brought up your disciplinary
16 matters?

17 A. If it involved the case, yes.

18 Q. And in what way would your disciplinary
19 matters involve your case?

20 A. As far as retaliation by the correctional
21 officers.

22 Q. So disciplinary matters for which those
23 particular correctional officers would have
24 retaliated against you; correct?

25 A. Correct.

1 Q. You testified that you talked to the law
2 firm about your drug activity; correct?

3 A. Correct.

4 Q. When did you have those conversations?

5 A. 2002.

6 Q. And in what context did you have those
7 conversations?

8 A. Just as far as what I was doing.

9 Q. Why did you have those conversations?

10 A. Because it related to the case I was
11 involved in.

12 Q. So it related to the criminal case where
13 you were going to testify, or the civil case?

14 A. The separate case.

15 Q. And with whom did you discuss your drug
16 activity?

17 A. With Donatelli.

18 Q. And did you discuss your drug activity
19 outside of prison or inside prison?

20 A. Outside of prison.

21 Q. Did you discuss at all your drug activity
22 inside prison?

23 A. Yes.

24 Q. And this was, again, you said in 2002?

25 A. No; 2002 was one time. The other time was

1 in 1998, approximately.

2 Q. And you said that you talked to the law
3 firm about acts of violence; is that correct?

4 A. Correct.

5 Q. When did you have those conversations?

6 A. 1998.

7 Q. And with whom?

8 A. Donatelli and other people that represented
9 his firm.

10 Q. You said that the representation ceased in
11 2007; correct -- or I'm sorry, your communications
12 ceased in 2007?

13 A. Correct.

14 Q. Why did it cease?

15 A. Because throughout the time, from 2003,
16 when we stopped the case, he still managed my money.

17 Q. Did he provide any services for you other
18 than managing your money after 2003?

19 A. No.

20 Q. You said that the representation itself
21 ended in 2005. Does that mean that's when he stopped
22 managing your money, in 2005?

23 A. Right.

24 Q. So from -- okay, moving on.

25 You said that you remembered Mr. Lowry from

1 court dates.

2 A. Right.

3 Q. What court dates?

4 A. The court dates when I testified against
5 the correctional officers, the trial.

6 Q. And that was in the criminal case, the
7 federal criminal case?

8 A. Against the correctional officers, yes.

9 Q. And where was Mr. Lowry in the courtroom?

10 A. Everybody that was with Donatelli.

11 Q. So he was sitting with Mr. Donatelli?

12 A. Yes.

13 Q. Other than seeing Mr. Lowry in the
14 courtroom, do you remember seeing him any other time?

15 A. No.

16 Q. Did you have any conversations with Mr.
17 Lowry?

18 A. No.

19 Q. You said that you spoke with lawyers from
20 both Santa Fe and Albuquerque office; correct?

21 A. Correct.

22 Q. How did you know which offices the lawyers
23 came from?

24 A. Because they told me.

25 Q. How many lawyers did you speak to who were

1 from the Santa Fe office?

2 A. I don't recall.

3 Q. How many lawyers did you speak to from the
4 Albuquerque office?

5 A. I don't recall.

6 Q. How many conversations have you had with
7 this group of prosecutors about Mr. Donatelli?

8 A. One, maybe.

9 Q. And when was that conversation?

10 A. Just the other day.

11 Q. When you say, "just the other day," within
12 the last week?

13 A. Yes.

14 Q. So before last week you've never spoken to
15 anyone from this office about Mr. Donatelli?

16 A. No.

17 Q. How about with Mr. Acee?

18 A. I don't recall.

19 Q. You don't recall speaking to him about Mr.
20 Donatelli?

21 A. About Mr. Donatelli representing me in a
22 case?

23 Q. Yes.

24 A. Yes.

25 Q. When did you have that conversation?

1 A. I don't recall.

2 Q. Was it within the last year?

3 A. Yeah, probably 2014, maybe.

4 MS. JACKS: Excuse me, Your Honor. We're
5 having trouble hearing in the back of the courtroom.

6 THE COURT: Why don't you move the mic.

7 Q. So you think, in approximately 2014, you
8 spoke to Bryan Acee about Mr. Donatelli having
9 represented you in the civil case?

10 A. Right.

11 Q. What do you recall about that conversation?

12 A. Just telling him as far as this
13 correctional officer incident and the lawsuit.

14 Q. At any point, did you discuss with Mr. Acee
15 what conversations or the topics of conversations you
16 had with Mr. Donatelli?

17 A. No.

18 Q. At any point, did you have a conversation
19 with any of these prosecutors about the topics of
20 your conversation with Mr. Donatelli?

21 A. No.

22 Q. Even when you met with them last week?

23 A. When I met with them?

24 Q. When you met with the prosecutors last
25 week, did you talk to them about the subject matter

1 of your conversations with Mr. Donatelli?

2 A. Yeah, I brought up my concerns, yes.

3 Q. And you raised those concerns for the first
4 time last week?

5 A. Correct.

6 Q. When you raised those concerns with them,
7 what did you tell them?

8 A. That Mr. Baca's attorney represented the
9 same firm that represented me in a lawsuit, who would
10 have access to the things that I told him.

11 Q. And why did you raise those concerns? I
12 mean, what prompted you to bring this issue up?

13 A. I just feel like it would be a conflict of
14 interest to have a defendant being represented by
15 someone that represented me.

16 Q. So did you raise the question of whether
17 there was a conflict of interest or did someone else
18 raise it to you?

19 A. I did.

20 Q. So just -- how did you learn that Mr. Baca
21 was represented by someone from Mr. Donatelli's
22 office?

23 A. Because I learned that you guys were trying
24 to subpoena me to show up to places, to get me to be
25 here.

1 Q. And so when you heard that we were
2 subpoenaing you is the first time that you learned
3 that Mr. Donatelli's office -- a lawyer from Mr.
4 Donatelli's office was Mr. Baca's attorney?

5 A. No. I knew he was being represented from
6 the day he went to court.

7 Q. Right. That's not my question. My
8 question is: When did you learn that an attorney
9 from Mr. Donatelli's firm represented Mr. Baca?

10 A. The day he went to court.

11 Q. Which day that he went to court?

12 A. When he first got initially charged.

13 Q. In December of 2015?

14 A. Right.

15 Q. And so did you raise your concerns then?

16 A. No. I hadn't been talked to.

17 Q. So -- okay. So in -- you said in 2014, you
18 talked to Bryan Acee about your lawsuit; correct?

19 A. And there was nobody that was represented
20 by any law firms at that point.

21 Q. And when is the next time that you talked
22 to Mr. Acee or any member of the government about the
23 Rothstein firm or Mr. Donatelli's representation of
24 you?

25 A. Last week.

1 Q. So before last week, you had never spoken
2 with Maria Armijo about your conversations with Mr.
3 Donatelli?

4 A. I haven't spoke with Maria Armijo since
5 2014, before anybody was represented.

6 Q. The only lawsuit which -- for which Mr.
7 Donatelli represented you was a civil lawsuit against
8 Wackenhut and others; correct?

9 A. Correct.

10 MS. DUNCAN: May I have a moment, Your
11 Honor?

12 THE COURT: You may.

13 BY MS. DUNCAN:

14 Q. You testified that you met with lawyers
15 from the Donatelli firm in Albuquerque; correct?

16 A. Correct.

17 Q. Where is that office?

18 A. I'm not sure right now.

19 Q. Can you describe what the office looks
20 like?

21 A. No.

22 Q. Can you describe whether you met with them
23 on the first floor? On an upper floor?

24 A. It was in a building. I don't know. I'm
25 not sure.

1 Q. How about the Santa Fe office?

2 A. The Santa Fe office was just a single-floor
3 building.

4 Q. And how often did you meet in the Santa Fe
5 office?

6 A. Once.

7 Q. Were you in custody at the time that you
8 met in the Santa Fe office?

9 A. Yes.

10 Q. And were you in custody at the time you met
11 in the Albuquerque office?

12 A. The Albuquerque office was the office that
13 we conducted --

14 MS. SIRIGNANO: Sorry, Your Honor, I can't
15 hear the witness.

16 A. The Albuquerque office was the initial
17 place that we conducted the lawsuit, to settle out of
18 court.

19 Q. So you met in the Albuquerque office to
20 discuss settling your case?

21 A. No. We settled out of court in the
22 Albuquerque office.

23 MS. DUNCAN: Okay. I have no further
24 questions, Your Honor.

25 THE COURT: Thank you, Ms. Duncan.

1 Mr. Lowry, I know that you'd indicated you
2 didn't want to cross-examine Mr. Duran. Is that
3 still the situation?

4 MR. LOWRY: Well, Your Honor, that puts me
5 in a bit of a pickle.

6 THE COURT: Yeah.

7 MR. LOWRY: I would like to ask --

8 THE COURT: I'm going to let you decide
9 whether you want to be in the pickle jar or out of
10 the pickle jar.

11 MR. LOWRY: I know pickle juice is the big
12 refresher these days. I think it's the high school
13 football team --

14 THE COURT: Ms. Wild started me on this.
15 For a long time I would eat the pickles and give her
16 the pickle jar. But now I've been eating the pickle
17 juice myself. I don't know if I recommend it.

18 All right. Mr. Lowry.

19 MR. LOWRY: Just a few brief questions.

20 EXAMINATION

21 BY MR. LOWRY:

22 Q. Mr. Duran, you said that -- I just want to
23 clarify -- you said that I was in court with Mr.
24 Donatelli during your criminal case?

25 A. Yeah, I believe so.

1 Q. And you said that you had met me, or
2 recognized me, from one of the offices?

3 A. Correct.

4 Q. Which office?

5 A. The Albuquerque office.

6 Q. In what year was that?

7 A. I'm not sure. I don't recall.

8 Q. Okay. I think you just spoke to Ms.
9 Duncan, and you said -- how many times had you been
10 to the Albuquerque office?

11 A. Once.

12 Q. And if I recall correctly, that was when
13 you settled your civil case?

14 A. Right.

15 Q. So that would have been before the notice
16 of settlement was issued or filed with the court?

17 A. I'm not sure.

18 Q. Well, you wouldn't have dismissed your case
19 before you settled it, would you have?

20 A. No. I believe the case got dismissed after
21 I settled it.

22 Q. So my question is: You would have been in
23 the Albuquerque office before the date of the
24 dismissal of your case?

25 A. Correct.

1 MR. LOWRY: No further questions, Your
2 Honor.

3 THE COURT: All right. Thank you, Mr.
4 Lowry.

5 Any other defense counsel, other
6 defendants, have any question of Mr. Duran?

7 Mr. Del Valle, do you have any questions
8 that you wish to ask Mr. Duran?

9 MR. DEL VALLE: No, Your Honor.

10 THE COURT: All right. Mr. Castellano, do
11 you have --

12 MR. CASTELLANO: Yes, sir. Thank you.

13 THE COURT: -- redirect?

14 REDIRECT EXAMINATION

15 BY MR. CASTELLANO:

16 Q. Mr. Duran, you indicated that you had
17 discussions with Agent Acee and with Ms. Armijo in
18 2014. Do you remember when you first met each of
19 them, what year it was?

20 A. Yes.

21 Q. When do you think that was?

22 A. 2014.

23 Q. Why do you think it was 2014?

24 A. Because I met them in February of 2014 --
25 or I met Mr. Acee in 2014.

1 Q. Do you remember giving a statement to FBI
2 agents in February of 2015, including a woman named
3 Katie Brusuelas?

4 A. That was 2015. I'm sorry, it was 2015. I
5 met Mr. Acee in May, and I met Katie in February, and
6 I met Ms. Armijo in August.

7 Q. August of 2015?

8 A. Correct.

9 Q. Now, you mentioned actually three things:
10 You mentioned a civil suit, testifying against the
11 corrections officers, and then the Donatelli firm
12 managing your money. Can you tell the Court whether
13 all three of those things related to the same
14 incident?

15 A. They did.

16 Q. So, in other words, did corrections
17 officers assault you?

18 A. Correct.

19 Q. Did you file a civil suit in response to
20 that assault?

21 A. Correct.

22 Q. And after that, did the Department of
23 Justice then prosecute those correction officers for
24 the same incident?

25 A. Correct.

1 Q. And then, prior to your testimony in the
2 criminal case, did the Donatelli firm help you
3 prepare for your testimony in any way?

4 A. Yes.

5 Q. Okay. How did they help you prepare for
6 your testimony?

7 A. They just helped me prepare for it.

8 Q. In other words, did they tell you certain
9 things that the other defense attorneys in the
10 criminal case might ask you?

11 A. Yeah, correct.

12 Q. Including any prior bad acts you may have
13 been engaged in?

14 MS. DUNCAN: Your Honor, I object to
15 leading.

16 THE COURT: Overruled.

17 A. Correct.

18 Q. So, in other words, if you had done
19 other -- other things for which the defense attorneys
20 in the criminal case could impeach you, did the
21 Donatelli firm help you prepare for that kind of
22 testimony?

23 A. Correct.

24 Q. And then, when you talked about the
25 Donatelli firm helping you manage your money, was

1 that from the civil suit in which you settled?

2 A. Yes.

3 MR. CASTELLANO: I have no further
4 questions, Your Honor.

5 THE COURT: All right. Thank you, Mr.
6 Castellano.

7 All right. Mr. Duran, you may step down.
8 Thank you for your testimony.

9 Well, even though I'm not going to take a
10 colloquy of Mr. Baca at the present time because I
11 want to read material that's come in -- I've been
12 looking at it and refreshing my memory about the
13 Government's filings while we've been hearing
14 testimony -- I do think it would be a good idea to go
15 ahead and argue the motion again, because it looks
16 like I'm going to have to make a rather prompt ruling
17 on this, given the motions that we're going to have
18 to hear this week.

19 So, Mr. Castellano, why don't I let you go
20 first, since I think it was the Government that
21 raised the potential conflict here.

22 MR. CASTELLANO: Your Honor, I think we
23 fleshed out some more facts today that we didn't know
24 last time, because --

25 THE COURT: Tell me what I'm hearing for

1 the first time. I certainly have heard some things
2 that I think I'm hearing for the first time. But
3 what's your list?

4 MR. CASTELLANO: What we didn't know was
5 the extent of the representation or the length of
6 time of the representation, or that the
7 representation not only covered the civil case, but
8 the criminal case, and the management of Mr. Duran's
9 funds.

10 And so, as Mr. Duran testified, what the
11 Donatelli firm helped him do, in addition to meeting
12 with the Department of Justice officials, prior to
13 his testimony in the criminal case, was they helped
14 him prepare for testimony, including what to expect
15 when he might be attacked for any prior bad acts he
16 may have done in the Corrections Department, or
17 otherwise. And so any of that conduct, if it
18 involved criminal activity, those are things which
19 the Donatelli firm knows about Mr. Duran, and in
20 fact, helped him to prepare when he was going to be
21 questioned about those things.

22 So I think the representation is more
23 extensive than we knew last time we were here,
24 because we didn't have the benefit of Mr. Duran's
25 testimony, which he recalls extending into 2007. So

1 that would have taken him well within the timeframe
2 that we're talking about here.

3 And so, when we talk about things such as
4 acts of violence or drug trafficking, those are
5 things which are racketeering acts, which are things
6 we allege that the criminal enterprise does. And so
7 they do relate to the charges in this case because
8 they touch on some of the elements.

9 I think that's what I would add to the
10 analysis, Your Honor.

11 THE COURT: All right. Thank you, Mr.
12 Castellano.

13 Ms. Duncan, do you want to go first? Do
14 you want Mr. Lowry to go first? How do you want to
15 proceed?

16 MR. LOWRY: Your Honor, I would like to go
17 first. And then I'd like Ms. Duncan to follow-up if
18 I may.

19 THE COURT: All right. Mr. Lowry.

20 MR. LOWRY: Your Honor, I agree with Mr.
21 Castellano in the sense that -- and, as I said to the
22 Court in December, you know, I haven't spoke to Mr.
23 Donatelli about the representation of Mr. Duran. So
24 all of this today was news to me.

25 In December -- and I continue to adhere to

1 this position -- the standard is really an objective
2 standard. And the Court should look at the scope of
3 the representation in the civil case and make an
4 assessment whether the kinds of topics that Mr. Duran
5 claims to have spoken to Mr. Donatelli about would be
6 necessary in the context of that case. And if they
7 weren't, then you can make a finding that there is --
8 there was no confidential information that would have
9 been shared.

10 I understand Mr. Duran has testified today
11 that he did talk about prior bad acts. But, again,
12 this brings me back to the point is -- this case is
13 about the SNM, and his prior bad acts before 2002
14 would have been unrelated to the SNM.

15 So I just heard, you know, all about this
16 timeframe extending -- I heard various dates, from
17 2005 to 2007. So all of that is news to me. And I
18 would appreciate it, perhaps, if the Court would, you
19 know, task Ms. Duncan with going back and seeing if
20 any of that is remotely real.

21 I mean, I work in the office. I would say
22 this -- and the reason I wanted to step into the
23 pickle and ask Mr. Duran the few questions I did, is
24 just to assess his credibility. And, to me, it's
25 rather striking that he's willing to say that he met

1 me in the office at the Rothstein law firm during his
2 settlement conference, which took place sometime
3 before the September 18, 2002 settlement. At the
4 time, I was a law clerk for Chief Justice James A.
5 Parker, so I would have been in the federal
6 courthouse at the time. So that's highly unlikely.
7 It just stretches one's imagination past the breaking
8 point, to hear him say some of the things he said.

9 So, if the Court would be so inclined -- I
10 know that the firm has a policy of sending case
11 closing letters when the case wraps up. And maybe
12 that is one of the things that would help us
13 determine whether the scope of representation lasted
14 as long as Mr. Duran claims that it did.

15 But it gives me no great pleasure to say
16 that I think a lot of what was said was fanciful.
17 But, at the end of the day, all of his prior bad
18 acts, any of his conduct, would have been unrelated
19 to the SNM, by his own admission to the FBI on
20 February 19, 2015.

21 So at the last hearing you'd asked me to
22 look at cases about the appropriate type of remedy.
23 And I'd encourage you to look at the last section of
24 the brief we filed yesterday. The best I could find
25 was the New Hampshire courts allow exactly what we

1 proposed in this case, and that is to have substitute
2 counsel handle that witness. The New Hampshire
3 courts even go a step further, to allow a lawyer in
4 the office -- in that case, the public defender's
5 office, who has represented government witnesses. It
6 doesn't disqualify the public defender and other
7 attorneys, as long as they're, you know, Chinese
8 walled off from the original case file, and the
9 original attorneys are allowed to represent new
10 clients who have to cross-examine former clients of
11 the firm. And that is the case when the two cases
12 are not, as the Court has already indicated,
13 substantially similar. These cases aren't similar at
14 all.

15 And I would urge the Court to consider a
16 remedy that's short of disqualification along the
17 lines that we put in place immediately upon realizing
18 Mr. Duran's involvement in the case, Your Honor.

19 Thank you.

20 THE COURT: All right. Thank you, Mr.
21 Lowry.

22 Ms. Duncan?

23 MS. DUNCAN: Your Honor, I'd like to start
24 out by discussing the letter that I sent to you that
25 was attached to our response. I've had a couple of

1 conversations with Mr. Donatelli about this matter.
2 And as I lay out in my letter, he denies ever having
3 a conversation with Duran about gang life or drug use
4 or priors.

5 He said that the liability for the civil
6 case was really won for him by the U.S. Attorney's
7 Office, when they convicted the correctional officers
8 who beat Mr. Duran.

9 So, for him, the focus was money. You
10 know, what was the damage to Mr. Duran, and what was
11 that worth?

12 I have talked to him. Ms. Armijo informed
13 Mr. Lowry that Mr. Duran was going to make these
14 claims about having these conversations. I spoke to
15 Mr. Donatelli after learning of that. He, again,
16 repeated that he did not have -- he has no
17 recollection of having any such conversations, and he
18 can't imagine why he would in the limited context of
19 the case.

20 You know, even listening to Mr. Duran
21 testify right now -- I mean, he's talking about
22 conversations that he had in 1998, and as late as
23 2002, with Mr. Donatelli and the U.S. Attorney's
24 Office, preparing to testify for that criminal case.

25 The Government has conceded, and all the

1 documentary evidence in this case suggests that
2 Mr. Duran did not begin his alleged affiliation with
3 the SNM until 2005.

4 So if he's talking about gang life, he's
5 not talking about the SNM. If he's talking about
6 drug stuff, he's not talking about drug stuff related
7 to this case here.

8 In terms of his acts of violence, they are
9 well documented in court records, and also in his
10 disciplinary file.

11 So there is no confidential information
12 that could be used in this lawsuit from 2002. And
13 just using that objective standard, there is nothing
14 that we would use. And even if there were, as Mr.
15 Lowry has pointed out, having me do the
16 cross-examination -- I am not a member of the
17 Rothstein law firm. I've never represented
18 Mr. Duran. I'm relying on the extensive records,
19 both criminal records, disciplinary records, going
20 back as far as 1998, against Mr. Duran, to do the
21 cross-examination.

22 So there really just isn't a conflict here.
23 And the fact that Mr. Donatelli represented Mr. Duran
24 back in 1998 to 2001, does not put the Rothstein firm
25 off limits in any case in which Mr. Duran might be a

1 witness. They're not substantially related.

2 And what the Government is doing here is
3 asking this Court to knock Mr. Lowry off, to
4 disqualify him as Mr. Baca's counsel three weeks
5 before trial. Mr. Baca has a Sixth Amendment right
6 to the effective assistance of counsel. And the
7 Government is seeking to invade that right, to deny
8 him of that right based on speculation, and not
9 credible testimony by Mr. Duran.

10 I mean, it's clear that Mr. Duran is doing
11 what he thinks he needs to do to win the Government's
12 favor, having absconded and now gotten himself in
13 trouble with them.

14 So we have on the one hand, you know, one
15 of the most respected members of the defense
16 community here in New Mexico, Mr. Donatelli --

17 THE COURT: Let me do this: I don't want
18 to rush us on this. I don't want to rush you or me
19 on this. But I do need to let Ms. Bean have a break.
20 And it will give me a little bit of time to continue
21 to read your document that you filed last night.

22 So let's take a break now. We'll be in
23 recess for about 15 minutes, then we'll hear it.

24 (The Court stood in recess.)

25 THE COURT: All right. Let's go back on

1 the record. Looks like to me all defendants have a
2 counsel. Check around, look around, make sure your
3 co-defendants have a counsel.

4 All right. Ms. Duncan, if you wish to
5 continue your response to the Government's motion.

6 MS. DUNCAN: Thank you, Your Honor.

7 Your Honor, just before I finish my
8 argument as an evidentiary matter, Mr. Lowry
9 mentioned during his argument that he didn't join the
10 Rothstein Firm until 2003. And that at the time
11 Mr. Duran is claiming to have seen him in the firm
12 and sitting with Mr. Donatelli in the courtroom, he
13 was clerking with Chief Judge Parker. I don't know
14 if we could add that to the record as a proffer, or
15 have Mr. Lowry testify. If the Court has a
16 preference, if the Government has a preference --

17 THE COURT: Do you have any problem with me
18 just taking notice of that statement, Mr. Castellano?

19 MR. CASTELLANO: Your Honor, Mr. Lowry is
20 an officer of the court. I think the Court can take
21 that.

22 THE COURT: All right. Unless there is
23 some objection to that, the Court will add that to
24 the record.

25 MS. DUNCAN: The other fact that I think is

1 relevant to this argument that Mr. Lowry can provide
2 to the Court is that he's never met Mr. Duran, either
3 in 2002, 2003, or otherwise. I don't know if you can
4 do the same thing, as an officer of the court for
5 Mr. Lowry?

6 THE COURT: Can I accept that and add to
7 the record that that's Mr. Lowry's representation to
8 the Court?

9 MR. CASTELLANO: That's fine, Your Honor.

10 THE COURT: All right. Any objection?
11 That will be added to the record as well.

12 MS. DUNCAN: Thank you, Your Honor.

13 And I'll be brief. As you see in my
14 letter -- and Mr. Donatelli -- if the Court wanted to
15 speak with him -- said that he would be available
16 this week either by phone, or if the Court wanted him
17 to, he would be willing to come and talk to the
18 Court. But given his consistency in his statements
19 to me, and his reputation as an officer of the court,
20 and also as one of the most ethical lawyers in New
21 Mexico, I can tell you that in every conversation
22 I've had with him since we first learned of the
23 Donatelli firm's representation of Duran in 2016,
24 that he has been clear that there was no conflict.

25 You know -- and as I was saying before the

1 break, you contrast that with Mr. Duran, who has made
2 several demonstrably false statements on the stand,
3 and is in trouble with the Government right now,
4 having absconded, he claims that it was just out of
5 his own concern for the conflict he raised it last
6 week to discuss it with the prosecutors. And we know
7 that's not true, given that the prosecutors filed a
8 motion to determine this conflict. And the Court,
9 itself, appointed counsel for Mr. Duran last month.
10 And the only reason we didn't hear this last month is
11 because Mr. Duran absconded.

12 So the bottom line is, Your Honor,
13 everything -- there is nothing new. We've known
14 since this issue first came up that the Donatelli
15 firm represented Mr. Duran in his lawsuit against
16 Wackenhut; that that lawsuit overlapped the criminal
17 case; that Mr. Donatelli was relying on the criminal
18 case to establish liability for the civil case; and
19 that both of those cases were over in 2002, before
20 Mr. Lowry joined the Rothstein firm, and before
21 Mr. Duran began allegedly associating with the SNM in
22 2005.

23 So using that objective standard, even a
24 subjective standard, there is no information that was
25 disclosed that would cause a conflict in this case,

1 given the disconnect between that lawsuit and the
2 present litigation.

3 And, as I said earlier, Mr. Baca -- he has
4 a Sixth Amendment right to counsel. We're three
5 weeks away from trial. The Government's effort to
6 kick Mr. Lowry off the case at this point is
7 unconscionable.

8 And when the Court does its colloquy with
9 Mr. Baca, Mr. Baca will waive any conflict. He very
10 much wants Mr. Lowry to be his counsel at trial with
11 me. And any concerns that the Court may have about
12 the conflict are remedied by our solution of I will
13 cross-examine Mr. Duran, as I have done today.

14 Thank you.

15 THE COURT: All right. Thank you, Ms.
16 Duncan.

17 I think I've read enough during the break,
18 the response that Mr. Baca filed last night, so I'm
19 going to go ahead and do a colloquy here at this
20 point, so that, if anybody needs to do anything
21 further as far as arguments, they'll be able to do
22 so.

23 So, Mr. Baca, I'm going to ask you to
24 stand, and I'm going to ask you some questions. I'm
25 sure your counsel has talked to you a little bit

1 about today and what may take place. So you're
2 prepared for this. Is this correct?

3 THE DEFENDANT: That's correct.

4 THE COURT: All right. Mr. Baca, do you
5 understand that you have a right to a conflict-free
6 counsel, and that is a counsel that doesn't owe any
7 obligations, loyalties, duties to anyone else other
8 than to you in this case?

9 THE DEFENDANT: I understand that.

10 THE COURT: And do you understand the facts
11 surrounding the Rothstein's firm, Mr. Donatelli's
12 representation, previous representations of Mr. Eric
13 Duran, that it was in -- and this is your counsel's
14 position that it's unrelated -- I've yet to make that
15 determination, but they made a statement that it's
16 unrelated. And you listened to us on December 7 and
17 today about the circumstances of that. Do you think
18 you understand that prior case and the Rothstein's --
19 Mr. Donatelli's representation of Mr. Duran?

20 THE DEFENDANT: I do, Your Honor.

21 THE COURT: And do you understand that Mr.
22 Lowry, as a part of that Rothstein Firm, may have
23 duties of loyalty stemming from the Rothstein firm's
24 previous representation of Mr. Duran? Do you know
25 they may have some ongoing duties of loyalty to

1 Mr. Duran?

2 THE DEFENDANT: Yes.

3 THE COURT: And do you understand that Mr.
4 Donatelli's and the Rothstein's duties to Mr. Duran
5 may impact upon Mr. Lowry's representation of you;
6 that there may be something that comes up that Mr.
7 Donatelli is not presently remembering; he may have
8 gotten some pertinent information that he learned
9 during the course of his representation, the
10 Rothstein Firm's representation of Mr. Duran; do you
11 understand that something could come up that may
12 impact the Rothstein's firm representation of you?

13 THE DEFENDANT: I do, Your Honor.

14 THE COURT: And do you understand that
15 there is a risk that Mr. Lowry and his firm may have
16 to choose between their duty of loyalty to you and
17 duty of the loyalty to Mr. Duran, and, you know,
18 there may be an impact upon Mr. Lowry's zealous
19 advocacy for you?

20 THE DEFENDANT: I understand.

21 THE COURT: If -- and this is already, I
22 guess, happened -- I'm not as informed or
23 knowledgeable about what Mr. Duran is going to say,
24 as maybe you have -- but if he's going to cooperate
25 and testify -- you may know what he's going to be

1 saying better than I do -- Mr. Lowry and Ms. Duncan
2 are going to be forced to cross-examine Mr. Duran.
3 And Mr. Lowry's duty of loyalty, through his firm, to
4 Mr. Duran may affect their performance in some way
5 that I can't fully anticipate at the moment. But it
6 could. Do you understand that possibility?

7 THE DEFENDANT: I do understand.

8 THE COURT: Additionally, the Rothstein's
9 firm, and Mr. Lowry's duties to Mr. Duran through Mr.
10 Donatelli and his firm may affect trial strategies,
11 including arguments, including relative culpability
12 between the defendants here. Do you understand that
13 there could be an impact there?

14 THE DEFENDANT: I do, Your Honor.

15 THE COURT: I'm going to have you look at a
16 waiver. Did you look at a written waiver,
17 Ms. Duncan, Mr. Lowry?

18 MS. DUNCAN: Your Honor, we have not seen
19 the waiver.

20 THE COURT: I'm going to have Ms.
21 Standridge hand you one that I used in another case.
22 And I'll ask you to work one up, and to show it to
23 the Court and show it to Mr. Baca and Mr. Lowry as
24 well.

25 So, Mr. Baca, when you review the final

1 product of this, I'll be asking you some further
2 questions about whether you reviewed it and you're
3 ready to sign it after you've been fully advised,
4 particularly in this matter by Ms. Duncan. So do you
5 understand what is going to take place from here on
6 out?

7 THE DEFENDANT: I do, Your Honor.

8 THE COURT: Knowing that a conflict may
9 arise in the future and the risk associated with such
10 a conflict, do you still wish to waive that conflict
11 and continue to have Mr. Lowry and the Rothstein Firm
12 as your attorney in this case?

13 THE DEFENDANT: I do wish to waive.

14 THE COURT: All right. So we'll prepare
15 that written document. We'll all take a look at it.
16 And Ms. Duncan will go over it with you.

17 All right. Anything else you want to say
18 on this issue, Mr. Baca, to the Court?

19 THE DEFENDANT: No, I'm fine.

20 THE COURT: All right. Thank you, Mr.
21 Baca.

22 THE DEFENDANT: Thank you.

23 THE COURT: Is there anyone else that
24 wishes to comment on the Government's motion?

25 All right. Mr. Del Valle, do you have

1 anything you wish to say on behalf of Mr. Duran?

2 MR. DEL VALLE: No, Your Honor.

3 THE COURT: All right. Mr. Castellano, do
4 you have anything further you wish to say on this
5 motion?

6 MR. CASTELLANO: No, Your Honor.

7 THE COURT: All right. Well, I'm still
8 where I was in December when I first had the issue,
9 that I'm not convinced that there is the same
10 conflict or dispute that caused me to have problems
11 with Mr. Davis' representation. So I'm inclined to
12 think that, A, there is not a violation or any
13 conflict that causes a conflict here because it's not
14 the same subject matter.

15 Secondly, I think the Tenth Circuit in
16 Winkle has indicated that if Ms. Duncan handles the
17 cross-examination of Mr. Duran, that may solve any
18 sort of problems.

19 So probably what I'll do is I'll expedite
20 some looking at this. I should have said at the
21 beginning, to let y'all know what I'm working on,
22 given that issue that kind arose at the end of the
23 hearing on the last day we were together in December,
24 there wasn't really a clear vehicle to put that issue
25 in. I decided that of all the things that I need to

1 work on, that probably is the murkiest. And so I
2 wanted to go in and get some clarity for myself on
3 these evidentiary issues going into trial.

4 I chose as the vehicle the James motion.
5 So, while I don't think there was a lot of dispute
6 about the James, it seemed to have arisen in the
7 James motion, either Mr. Perez' or Mr. Baca's or Mr.
8 Sanchez' or Mr. Herrera's. Those seemed to be the
9 places it was coming up with the testimony we were
10 getting from the cooperating witnesses. So I've
11 chosen to work on that. I'm going to put that aside.
12 I'm going to try to reach an answer here. So you're
13 probably not going to get any full opinion, but maybe
14 you'll get an oral ruling from me before we get out
15 of here this week. But I'm inclined to not
16 disqualify the firm or Mr. Lowry. So that's where I
17 am at the present time on that motion.

18 All right. I think the next thing we need
19 to do is to take up the conflict and waiver issues as
20 to Mr. Garcia. And, of course, that's a little bit
21 different situation.

22 I understand that this is unopposed by the
23 Government, and by everybody else. So I just want to
24 get a colloquy with Mr. Garcia that he doesn't have
25 any problem with Ms. Sirignano representing him in

1 this matter despite some involvement at the U.S.
2 Attorney's Office on some issues. Anybody want to
3 say anything on this first before we deal with this?
4 Ms. Sirignano?

5 MS. SIRIGNANO: No, Your Honor. It's all
6 contained in the pleading.

7 THE COURT: All right. How about you, Mr.
8 Castellano? Ms. Armijo? Anything you want to say?

9 MS. ARMIJO: No, Your Honor.

10 THE COURT: Anybody else have any issue on
11 this?

12 All right. Mr. Garcia, if you'll stand,
13 I'm going to ask you a few questions. Again, they're
14 very similar to what I've just asked Mr. Baca. But
15 you've been listening today, and of course over the
16 course of these hearings. You understand that you're
17 entitled, and that you have a right to a
18 conflict-free counsel?

19 THE DEFENDANT: Yes.

20 THE COURT: All right. And I won't go into
21 as much detail as I have in others, but you
22 understand you have the right to an attorney that
23 represents only you and your interests, and is not
24 conflicted in any way with loyalty to anybody else?

25 THE DEFENDANT: Yes, Your Honor, I do.

1 THE COURT: And do you understand the facts
2 surrounding Ms. Sirignano's previous representation
3 of the United States, by being an Assistant United
4 States Attorney, and her involvement in anything
5 related to SNM?

6 THE DEFENDANT: Yes.

7 THE COURT: All right. Ms. Sirignano,
8 anything you want to add to this? I'm sure you've
9 explained to Mr. Garcia your involvement. But
10 anything you want to put on the record so that it's
11 clear that he understands what your involvement was?

12 MS. SIRIGNANO: Your Honor, yes. I -- Mr.
13 Adams advised him of what my involvement was, and I
14 did as well, in getting that pen register back in, I
15 think it was 2005. And he understands what limited
16 involvement I had, and that I wasn't working in that
17 investigation in any way other than getting the
18 magistrate judge's signature on that trap and trace
19 order. And while we don't believe there is a
20 conflict, he's agreed to waive any conflicts, after
21 me and Mr. Adams spoke with Mr. Garcia.

22 THE COURT: All right. Mr. Garcia, do you
23 understand that Ms. Sirignano, because she
24 represented the Government at one time, may have some
25 duties of loyalty stemming from her previous

1 representation of the United States? There may be
2 things that she worked on there that she can never
3 reveal to anybody. Do you understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: And do you understand that Ms.
6 Sirignano's duties to the United States may -- I
7 can't say how they would -- but they may impact --
8 something might come up about her representation of
9 you; should she all of a sudden recall some pertinent
10 information that she learned during the time that she
11 represented the United States, and was sitting over
12 at that table. Do you understand that could happen?

13 THE DEFENDANT: Yes, I do.

14 THE COURT: Do you understand that there is
15 a risk that Ms. Sirignano will have to choose at that
16 point, or some other point, between her duty of
17 loyalty to you and her duty to the United States, and
18 her duty to zealously advocate for you? Do you
19 understand that that risk can pop up at some point?

20 THE DEFENDANT: Yes.

21 THE COURT: And if Ms. Sirignano chooses --
22 you know, something could come up with somebody that
23 cooperates, somebody that's testifying, she may be
24 required to cross-examine some people that she can't
25 predict at the present time, and her duty of loyalty

1 to you, and then to the United States, may affect her
2 performance. Do you understand you run a risk there?

3 THE DEFENDANT: Yes.

4 THE COURT: Additionally, Ms. Sirignano's
5 duties to the United States at some point may affect
6 trial strategies, including arguments regarding
7 relative culpability with all the people that's in
8 the room. There is maybe something that pops up
9 that, all of a sudden is a problem, given that she
10 was an assistant United States Attorney at one time.
11 Do you understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: I'm going to ask you to execute
14 a similar waiver. So I'll ask you to get a copy of
15 that, Ms. Sirignano, and you and Mr. Adams -- and I'd
16 like particularly Mr. Adams to be the one that
17 advises Mr. Garcia, and goes over it with him. And
18 then if y'all present it to the Court, and at that
19 time I'll probably ask you some additional questions,
20 Mr. Garcia, to make sure that you reviewed it. But
21 do you understand how we're going to proceed here?

22 THE DEFENDANT: Yes, I do.

23 THE COURT: All right. Knowing that a
24 conflict may arise in the future and the risks
25 associated with such a conflict, Mr. Garcia, do you

1 still wish to waive any conflict Ms. Sirignano has
2 and continue with Ms. Sirignano as your attorney?

3 THE DEFENDANT: Yes, I do.

4 THE COURT: All right. And I understand
5 the Government doesn't oppose Ms. Sirignano
6 continuing to be an attorney on this case?

7 MS. ARMIJO: No, Your Honor.

8 THE COURT: All right. Thank you, Mr.
9 Garcia.

10 Ms. Sirignano.

11 MS. SIRIGNANO: Thank you, Your Honor.

12 THE COURT: One other question I want to
13 ask Mr. Castellano. As I work on Mr. Lowry's issues,
14 does the United States think that Mr. Lowry should be
15 conflicted out of the case, or where are you on the
16 issue, now that we've explored it with now
17 evidentiary testimony and a record and those sort of
18 things?

19 MR. CASTELLANO: Your Honor, I don't know
20 if I can say that we think he should be conflicted
21 off the case. What we wanted to do was make a
22 record, make sure we had a clean record before
23 proceeding to trial in this matter.

24 THE COURT: All right. Fair enough. Thank
25 you, Mr. Castellano.

1 All right. The next issue then -- and I'll
2 accept the waiver after we complete the paperwork on
3 it; make sure that Mr. Garcia has had a chance to
4 think about it. The same way with you, Mr. Baca.
5 I'm inclined to accept your waiver as well. But
6 we'll nail that down after you've had a chance to
7 look at the paperwork.

8 On the -- Mr. Jewkes and Mr. Blackburn, on
9 that issue, do we want to wait until Mr. Blackburn is
10 here, or do you want to proceed?

11 MR. DAVIDSON: I think that would be
12 better, Your Honor.

13 THE COURT: Do you want to wait? Do you
14 agree with that, Mr. Jewkes?

15 MR. JEWKES: Yes, sir, I do.

16 THE COURT: All right. So we'll wait until
17 Mr. Blackburn is here and then we can maybe make a
18 more robust record on that. I still want you to be
19 the one that's primarily advising the defendant on
20 this. But at the same time, it might make sense to
21 have Mr. Blackburn here.

22 MR. JEWKES: We believe that will be
23 Wednesday.

24 THE COURT: Is that when Mr. Blackburn is
25 going to be here?

1 MR. DAVIDSON: Your Honor, I don't think
2 he's going to be here today, tomorrow, or Wednesday.
3 But if we go on to Thursday, he will be here.

4 THE COURT: Okay. Well, let's see how it
5 goes. We probably won't get out of here without
6 doing it. So, if we look like we're going to wrap up
7 things on Wednesday, I may go ahead and just do it.

8 On the other hand, if it's something that
9 we're going to be here on Thursday, maybe we can wait
10 till Thursday to do it. Does that create any
11 problems for you, Mr. Jewkes?

12 MR. JEWKES: No, problems, Your Honor.

13 THE COURT: All right. So we'll hold off
14 on that.

15 Ms. Wild, remind me, I didn't at the
16 beginning of the hearing say anything about who else
17 is on the phone. I know that Ms. Fox-Young is on the
18 phone, Ms. Wild is on the phone. Anyone else on the
19 phone?

20 MS. STRICKLAND: This is Margaret
21 Strickland. I'm on the phone.

22 THE COURT: Okay. Ms. Strickland, good
23 morning to you.

24 MS. HARBOUR-VALDEZ: And our paralegal,
25 Raquel Rodriguez, is on the phone.

1 MS. RODRIGUEZ: Yes, Your Honor. This is
2 Raquel Rodriguez. I'm on the line.

3 THE COURT: All right. Good morning to
4 you.

5 All right. I understand that the next
6 issue we take up is Mr. Baca's motion to suppress
7 coerced statements, and anticipated testimony of
8 cooperating witnesses. So this is an evidentiary
9 hearing. Do you want to make some preliminary
10 remarks, Mr. Lowry? Ms. Duncan?

11 MS. DUNCAN: I'll be very brief, Your
12 Honor. One thing we discussed with the Government
13 this morning is we have two motions, 1325 and 1328.
14 One is the motion to suppress statements. The other
15 is a motion to suppress for selective recordings.

16 THE COURT: Do you want to take these up
17 together?

18 MS. DUNCAN: I think so for the purposes of
19 witnesses, rather than calling people back. So I'll
20 be arguing the motion to suppress coerced statements,
21 and Mr. Lowry will be arguing the motion to suppress
22 the selective recordings.

23 THE COURT: All right. Is that agreeable
24 to the Government? Can we just take these two
25 motions up together?

1 MS. ARMIJO: Yes, Your Honor.

2 THE COURT: All right. Anything you want
3 to say, then, in support of both motions?

4 MS. DUNCAN: Your Honor, so I will argue on
5 the motion for the coerced statements. And we
6 anticipate having testimony from Mr. Duran; also
7 Sergio Sapien, who is part of the STIU; Chris Cupit,
8 also STIU; and Edward Urtiaga, also STIU.

9 So the basis of our motion is, at the time
10 that Eric Duran decided to provide information to the
11 Government, he had incurred two disciplinary
12 infractions. The first was possession of a shank,
13 which is a Grade A violation in the Department of
14 Corrections, and can result not only in criminal
15 charges, and in the State of New Mexico possession of
16 a shank by a prisoner is a second degree felony that
17 carries a presumptive sentence of nine years. But it
18 also, as a Grade A violation, could result in the
19 loss of all of his good time and all of his
20 privileges.

21 A week later, he picks up a second level A
22 violation. This time because he threatened to kill a
23 correctional officer, Edward Urtiaga, threatening to
24 go to his home, telling Officer Urtiaga that he knew
25 where he lived, knew what car he drove, and that he

1 was going to harm him. Again, this was a serious
2 violation that could result in a loss of all good
3 time and privileges and also criminal prosecution.

4 MR. BECK: Your Honor, I don't want to
5 interrupt, but Mr. Duran is in the room, and he will
6 be a witness --

7 MS. DUNCAN: That's a good point.

8 MR. BECK: The rule to exclude is in force,
9 so I --

10 MS. DUNCAN: Thank you, Mr. Beck. I
11 probably would reserve argument, Your Honor, until
12 Mr. Duran is no longer in the room.

13 THE COURT: All right. Thank you, Ms.
14 Duncan.

15 Anything the Government wants to say in
16 advance, or do you want to just go ahead and go to
17 testimony?

18 MR. CASTELLANO: I think we can go to the
19 testimony, Your Honor.

20 If you'll remember, Agent Brusuelas, who
21 already testified, testified that she was contacted
22 before these incidents occurred. So I'll just remind
23 the Court of that. But I think we can continue with
24 the testimony.

25 THE COURT: All right. Before I do,

1 Mr. Jewkes, I'm going to have Ms. Standridge hand to
2 you, so that maybe we're a little bit ahead of the
3 game, a form of waiver I brought down from
4 Albuquerque that you can review with Mr. Sanchez. I
5 understood you were going to waive any conflict?

6 MR. JEWKES: That is correct, Your Honor.

7 THE COURT: So that's the form -- you might
8 take a look at it. I'm not wedded to it, but I think
9 something like that, that you review with Mr. Sanchez
10 and he sign, and I can discuss it when we do a
11 colloquy with him later in the week. All right.

12 All right. Ms. Armijo, Mr. Beck, if y'all
13 want to call your first witness.

14 MS. ARMIJO: We would call Eric Duran.

15 THE COURT: All right. Mr. Duran, if
16 you'll come up and take the stand. Because we are
17 doing a different proceeding here, I'm going to have
18 Ms. Standridge swear you in.

19 ERIC PRESTON DURAN,
20 after having been first duly sworn under oath,
21 was questioned and testified as follows:

22 DIRECT EXAMINATION

23 THE CLERK: Please be seated, and state
24 your name for the record.

25 THE WITNESS: Eric Duran.

1 THE COURT: Mr. Duran. Ms. Armijo.

2 MS. ARMIJO: Thank you, Your Honor.

3 BY MS. ARMIJO:

4 Q. Mr. Duran, just for the record, how do you
5 spell your name?

6 A. E-R-I-C. D-U-R-A-N.

7 Q. And Mr. Duran, I'm going to go back a
8 little bit in time for you. Are you aware -- let me
9 ask a couple background questions. Are you aware of
10 what the SNM is?

11 A. Correct.

12 Q. And what is it?

13 A. Prison gang.

14 Q. Are you a member of that prison gang?

15 A. Yes -- was.

16 Q. When did you become a member?

17 A. 2005.

18 Q. Now, I'm going to jump forward, and to
19 approximately 2014, 2015 -- well, let's start 2014.

20 Were you still a member at that time?

21 A. Yes.

22 Q. At some point in time, did you decide to no
23 longer be an active SNM Gang member?

24 A. Yes.

25 Q. Can you tell us about when that you made

1 that decision?

2 A. Prior to getting a report.

3 Q. Okay.

4 A. February -- we'll say February 2015.

5 Q. Okay. So was it prior to February of 2015?

6 A. Correct.

7 Q. And what happened in February 2015 that
8 we're using that as a basis for time decisions?

9 A. Nothing really happened. I just got tired
10 of all the different chaos within the gang, and was
11 just deciding on who I was going to go to with the
12 information I had.

13 Q. Okay. I guess my question -- it was
14 probably a bad question -- was, you say prior to
15 February of 2015. Did something happen in February
16 of 2015, that you're using that start label that,
17 before this, I decided I was not going to be an SNM
18 Gang member?

19 A. Did something happen?

20 Q. Yes. What happened in 2015, February?
21 What happened with you and SNM, if anything?

22 A. Nothing really happened, no, nothing.

23 Q. Did you have some disciplinary issues that
24 occurred in February of 2015?

25 A. Disciplinary issues arose, but it wasn't

1 the reason of my cooperation.

2 Q. Okay. So, in February 2015, did you have
3 some disciplinary issues?

4 A. I got a disciplinary report -- well,
5 actually, I didn't get the disciplinary report before
6 I came forward, no.

7 Q. Okay. But were there some things that
8 occurred in February of 2015, that later on you
9 became aware you were facing disciplinary charges?

10 A. A shank, yeah.

11 Q. Okay. Now, do you remember meeting with
12 the FBI at some point in February of 2015?

13 A. Right, I did.

14 Q. Do you remember that agent's name or if it
15 was a man or a woman?

16 A. It was a woman.

17 Q. Do you even remember her name?

18 A. Katie.

19 Q. Was that the first time that you had spoken
20 to an FBI agent about potential cooperation?

21 A. Yes.

22 Q. Prior to that, did you ever speak to
23 anybody about leaving the gang or cooperating?

24 A. To STIU.

25 Q. Okay. What is STIU?

1 A. Security Threat Intelligence Unit.

2 Q. And where, at this time period, are you
3 being housed within the Corrections Department?

4 A. PNM 3A pod.

5 Q. Is that the North PNM or the South PNM?

6 A. North.

7 Q. And who did you initially speak to about
8 potential cooperation?

9 A. I initially spoke to Adam Vigil, and asked
10 him to speak to Sapien. And that was it. Just
11 Sapien, and Cupit came with him.

12 Q. Okay. You mentioned a couple of names.
13 Who is Adam Vigil?

14 A. Adam Vigil is the gang coordinator, the
15 STIU coordinator, at the North.

16 Q. And did you have -- if you recall, what
17 were the circumstances of your contact with
18 Mr. Vigil? I mean, how was it that you came to talk
19 to him?

20 A. During the interviews -- at this point, I
21 had no knowledge that they had even found a shank in
22 my cell. And I had already requested to talk to
23 Sapien.

24 Q. Okay. And I understand that. But I'm just
25 trying to get to what the circumstances were with

1 Mr. Vigil that you had a conversation. Do they
2 routinely come and talk to SNM members and interview
3 you?

4 A. Yeah. When they do shakedowns, it's their
5 routine that they usually interview us before they
6 put us back in our cell.

7 Q. Okay. So at some point you had a
8 conversation with Mr. Vigil?

9 A. Correct.

10 Q. And who was it that you requested to speak
11 to?

12 A. Sapien.

13 Q. Who is Sapien?

14 A. He's a Captain of STIU at the North
15 facility.

16 Q. And why is it that you chose Sapien, as
17 opposed to Mr. Vigil?

18 A. I just felt like the information that I was
19 going to give him was -- he was trustworthy. And I
20 didn't really trust nobody else.

21 Q. Okay. Is it fair to say that you trusted
22 Captain Sapien, and that's the person that you wanted
23 to deal with?

24 A. Correct.

25 Q. Okay. And at some point, did you talk to

1 Captain Sapien?

2 A. Probably like an hour later, after
3 requesting him.

4 Q. Okay. And you indicated that -- you said
5 Cupit was there?

6 A. Cupit came with him, yes.

7 Q. And who is Cupit?

8 A. Cupit is the Sergeant of the STIU.

9 Q. And what did you inform them?

10 A. I informed them that I had information and
11 I wanted to talk to the FBI.

12 Q. And why did you make that decision?

13 A. Because I felt like the information I had
14 was beyond their control.

15 Q. Okay. I guess -- what was the basis for
16 you to decide to cooperate?

17 A. I had been, you know, over in transition,
18 deciding about how I was going to go about
19 cooperating, and do it in a way that would keep me
20 safe, and at the same time, work with someone that I
21 could trust within the facility.

22 Q. Now, you mentioned that you were thinking
23 about ways to keep you safe. Was that a concern of
24 yours?

25 A. It was.

1 Q. And why is that?

2 A. Because the SNM is known to, you know,
3 murder people for paperwork, or telling.

4 Q. What is paperwork?

5 A. Paperwork is information that's given by an
6 individual that's against somebody else.

7 Q. Cooperation?

8 A. Cooperation.

9 Q. So now, when you made that decision, and
10 you spoke to Captain Sapien, was that before the
11 shakedown in February of 2015, that a shank was
12 found?

13 A. That was actually the moment I decided
14 would be the best time. Since everybody was being
15 interviewed, you know, everybody was talking to the
16 STIU, so there wouldn't be no -- like no one would
17 really raise a flag, if I was to do what I did.

18 Q. Okay. Had you made the decision before
19 then, to talk to them?

20 A. I did. I had already wrote letters to
21 Sapien before shakedowns had even occurred.

22 Q. Okay. Let's talk a little bit about that.
23 You wrote a letter to Sapien?

24 A. Right.

25 Q. Okay. And why did you write him a letter?

1 A. Two individuals were planning on attacking
2 another individual within the gang. And I just
3 didn't want to be involved in it no more.

4 Q. Okay. And so did you write him a letter
5 about that?

6 A. I did. But I hadn't sent it at that time,
7 because we got shaken down, like the day -- the next
8 day.

9 Q. So after you indicated that you wanted to
10 cooperate, was it after that that you spoke to FBI
11 Agent Katie Brusuelas?

12 A. When I spoke to Sapien, then a week later
13 maybe they took me to see the FBI.

14 Q. So -- and when you spoke to the FBI, were
15 you still the same mindset, that you wanted to
16 cooperate?

17 A. I was, fully.

18 Q. Did anybody make any threats against you to
19 get you to cooperate with the government? And when I
20 say "government," I just mean in general, either FBI
21 or Corrections, just any type of law enforcement?
22 Did anybody make any threats against you?

23 A. No.

24 Q. Were you coerced in any way?

25 A. No.

1 Q. Were you feeling any sort of duress, like
2 feeling that you had to do this for any reason, and
3 you felt pressure to do it, other than your own wish
4 to do it?

5 A. No.

6 Q. Now, at some point, as part of your
7 cooperation, did you agree -- and I guess I should
8 make this clear -- at this time, were you an inmate
9 within the New Mexico Corrections Department?

10 A. Correct.

11 Q. And up from 2014, through all of 2015, were
12 you an inmate?

13 A. Correct.

14 Q. At some point, for part of your
15 cooperation, did you agree to make recordings of
16 other SNM Gang members?

17 A. Correct.

18 Q. And what was the purpose of the recordings?
19 Do you recall?

20 A. To review information of plans they had to
21 assassinate the Secretary of Corrections and Dwayne
22 Santistevan, the head coordinator of STIU.

23 Q. And how were you aware of that conspiracy?

24 A. I received plans in 2013 by Mr. Baca to do
25 so.

1 Q. Okay, to do what?

2 A. To assassinate the Secretary of
3 Corrections.

4 Q. Now, at some point in time, were you placed
5 next to -- I'm going to be specific. At some point
6 in 2015, were you placed next to Mr. Baca?

7 A. Yes.

8 Q. And did you use a recording device that was
9 provided to you to record conversations?

10 A. I used a recording device and a cellphone.

11 Q. Okay. I was going to talk about the
12 cellphone next. So you were given a recording device
13 to use?

14 A. Correct.

15 Q. And I don't want you to give specifics of
16 what it looked like, but can you at least tell us
17 whether or not it was a recording device that turned
18 off and on?

19 A. It was a recording device that turned off
20 and on, and worked.

21 Q. And who had control of that?

22 A. I did.

23 Q. Now, how was it powered? In other words,
24 was it electrical, you plugged it into a wall? Or
25 was it battery operated? How is it that it worked?

1 A. It was battery operated.

2 Q. Okay. And were you given any instructions
3 with the recording device, as far as keeping it
4 charged up, so to speak, for usage?

5 A. That was really no way to keep it charged
6 up, just not keeping it on all the time.

7 Q. Were there any steps that you took in order
8 to preserve battery life?

9 A. I just -- I mean, I played it when it
10 needed to be played.

11 Q. Okay. So it wasn't turned on all the time?

12 A. It wasn't on when they were telling me
13 their life story, about how they met up with some
14 girl at a club.

15 Q. Okay. And so, when you say "they," did you
16 use it on more than one person, on other people other
17 than Mr. Baca?

18 A. Yes.

19 Q. And when you were using it, where were you?

20 A. Under the bunk, under the bed.

21 Q. In your cell?

22 A. Correct.

23 Q. And when you mentioned that you -- and I'm
24 going to be specific about Mr. Baca, because this is
25 his motion. When you were using it with Mr. Baca,

1 where was he?

2 A. On the other side of the wall.

3 Q. And could you talk to each other?

4 A. Correct.

5 Q. And were all of your conversations with Mr.
6 Baca recorded?

7 A. The majority of my conversations with Mr.
8 Baca were recorded, because he spoke relevant
9 information.

10 Q. Okay. What decision, if any, for you to
11 turn on or to not turn on a recording device with Mr.
12 Baca was it that you made?

13 A. When he strayed from conversation of
14 relevant information.

15 Q. Can you give us an example of that?

16 A. He could be talking about the hit, and then
17 he can go into talking about his mom.

18 Q. And, at any point in time -- you said that
19 the majority of the conversations with Mr. Baca was
20 recorded; is that correct?

21 A. Correct.

22 Q. Can you think of any conversation with Mr.
23 Baca that was not recorded, that was not, as you
24 would put it about his family and things like that?

25 A. I don't recall.

1 Q. Now, you mentioned that you also had a
2 cellphone.

3 A. Correct.

4 Q. And who provided you with that cellphone?

5 A. The FBI.

6 Q. And were you aware that that cellphone had
7 any sort of -- well, what was your understanding of
8 the cellphone as far as recordings?

9 A. The cellphone was recording every time I
10 dialed a phone number.

11 Q. Okay. And what about text messages?

12 A. Same thing.

13 Q. And were you given any instructions, as far
14 as letting other people use that?

15 A. It was just for my use.

16 Q. And where would you use it?

17 A. Where would I -- oh, I would use it in my
18 cell.

19 Q. And did you have conversations with people
20 obviously not in Corrections?

21 A. Correct.

22 Q. At any point in time, did you also have
23 conversations with people, and include Mr. Baca in on
24 those conversations?

25 A. Correct. And during those conversations,

1 even though I knew the cellphone was recording, I
2 also used the device that was given to me to record
3 the conversations.

4 Q. All right. So in the sense, there may be
5 times when Mr. Baca was being double recorded?

6 A. He was being double recorded on every
7 device I had.

8 Q. Now, did you at some point -- for the
9 device recordings, did the batteries have to be
10 changed out?

11 A. Yeah.

12 Q. Now, was that something that you could just
13 go, Hey, correctional officer, I need to get
14 batteries for my recording device?

15 A. No.

16 Q. Okay. What sort of -- was that something
17 you were in control of, or did people come to you?

18 A. Most of the time I would call them, and
19 they would just come switch out devices.

20 Q. And when you say you would call them, who
21 would you call?

22 A. I would call STIU Sapien.

23 Q. Okay. And the same Captain Sapien that you
24 were talking about earlier?

25 A. Correct.

1 Q. Is it fair to say that very few people in
2 Corrections knew that you had a recording device?

3 A. Yeah, very few.

4 MS. ARMIJO: If I may just have a moment?

5 THE COURT: You may.

6 Q. Finally, do you know if you received any
7 instructions from anybody, either FBI or STIU, as far
8 as what to record or, you know, whether or not you
9 should save battery life? What were the instructions
10 that were given to you?

11 A. I was given a device one time, and I had
12 left it on and continued to record, and it died. So
13 I was ending up not able to pick up a lot of the
14 information that I was supposed to be picking up
15 because the battery died. And that's when I was told
16 by the FBI to try to conserve battery life, to obtain
17 the proper information.

18 MS. ARMIJO: All right. Thank you. I pass
19 the witness.

20 THE COURT: Thank you, Ms. Armijo.

21 Mr. Lowry, Ms. Duncan, do you want to
22 cross-examine Mr. Duran?

23 EXAMINATION

24 BY MS. DUNCAN:

25 Q. You testified on direct that you were a

1 member of the SNM beginning in 2005; correct?

2 A. Correct.

3 Q. You previously denied being a member of the
4 SNM; correct?

5 A. I denied being a member of SNM?

6 Q. Yes.

7 A. I don't recall that.

8 Q. Do you recall having an interview with the
9 FBI on February 19th of 2015?

10 A. I do.

11 Q. And do you remember them asking you whether
12 or not you were a member of the SNM?

13 A. No.

14 Q. If I were to show you a partial transcript
15 of that interview, would that refresh your
16 recollection?

17 A. It may.

18 MS. DUNCAN: Your Honor, may I approach?
19 This is Government's Exhibit 1.

20 THE COURT: You may.

21 Q. If you could look at the first page,
22 it's -- I'm looking at page 1 of that transcript.

23 THE COURT: Let me ask while he's reviewing
24 it, the Government didn't have any exhibits for this.
25 So when you say "Government's Exhibit 1" --

1 MS. ARMIJO: Your Honor, I believe we had
2 FBI Agent Katie Brusuelas testify previously in this
3 hearing, and it was admitted during that hearing.

4 THE COURT: Well, that was for a different
5 motion; correct?

6 MS. ARMIJO: No. Same motion, Your Honor.
7 We started that because she was here in town, so we
8 started that when we last met before Christmas.

9 THE COURT: All right.

10 MS. ARMIJO: She testified then. And I
11 believe we had started it at Government's Exhibit 1
12 at that hearing.

13 THE COURT: All right.

14 BY MS. DUNCAN:

15 Q. Have you had an opportunity to review that
16 transcript?

17 A. Yeah.

18 Q. Does that refresh your recollection about
19 that conversation?

20 A. No, it doesn't.

21 Q. If, in 2015, you told the FBI that you were
22 not a member of the SNM, that would have been a lie;
23 correct?

24 THE COURT: Well, I'll make the
25 determination whether it's a lie or not. You can ask

1 if that's not his recollection or those sort of
2 things.

3 Q. So you're now testifying that you were
4 member of the SNM in 2015; correct?

5 A. Excuse me?

6 Q. That you were a member of the SNM in 2015?

7 A. Correct.

8 Q. So, if you told someone that you were not a
9 member of the SNM in 2015, that would not be true?

10 A. If I would have, yes.

11 Q. And in February of 2015, you were being
12 interviewed by FBI agents; correct?

13 A. Correct.

14 Q. Federal law enforcement officers; correct?

15 A. Correct.

16 Q. Now, you testified about the disciplinary
17 issues that arose in 2015; correct?

18 A. Correct.

19 Q. And you told -- when the FBI asked you why
20 you were cooperating, you told them you were
21 cooperating to give back to the community; correct?

22 A. Correct.

23 Q. And you told them that you were not in
24 trouble at the time; correct?

25 A. Correct.

1 Q. That most people who cooperate are in
2 trouble, but that wasn't you, you were doing it out
3 of the goodness of your heart; correct?

4 A. Correct.

5 Q. But that was not true; correct?

6 A. No.

7 Q. February 19th of 2015, you had picked up
8 two disciplinary write-ups; correct?

9 A. At that time I didn't have knowledge that I
10 had reports.

11 Q. You knew on February 19th of 2015 that they
12 had found a shank in your cell; correct?

13 A. Correct.

14 Q. And you knew that it was a violation of the
15 Department of Corrections' regulations for you to
16 have a shank in your cell; correct?

17 A. Correct.

18 Q. And that it was a Level A violation;
19 correct?

20 A. Correct.

21 Q. And it was also a criminal offense;
22 correct?

23 A. Correct.

24 Q. Because you had previously been convicted
25 of possessing a shank?

1 A. Correct.

2 Q. And you understood that being caught with a
3 shank meant that you could lose your good time?

4 A. Correct.

5 Q. You could lose your privileges?

6 A. Correct.

7 Q. And be put in restrictive housing?

8 A. Where I already was, correct.

9 Q. The day before you had your interview with
10 the FBI, you had been accused of threatening a
11 correctional officer?

12 A. Correct.

13 Q. Edward Urtiaga?

14 A. Correct.

15 Q. And you were aware that threatening a
16 correctional officer is a disciplinary violation?

17 A. Correct.

18 Q. A Level A violation at that?

19 A. Correct.

20 Q. So you could lose all your good time for
21 that?

22 A. Correct.

23 Q. You could be put in restrictive housing;
24 correct?

25 A. Correct.

1 Q. And lose all your privileges?

2 A. Correct.

3 Q. And, in fact, you were ultimately
4 disciplined for that; correct?

5 A. For what?

6 Q. For threatening Officer Urtiaga?

7 A. Correct.

8 Q. When you spoke to Adam Vigil, you said that
9 you did that following the interviews that were done
10 after the shakedown; correct?

11 A. Correct.

12 Q. Then you spoke with Mr. Sapien within an
13 hour following that?

14 A. Correct.

15 Q. At that time, had you written the letter to
16 Mr. Sapien?

17 A. I did.

18 Q. And did you provide him a copy of that
19 letter?

20 A. No. I'd didn't have to because I spoke to
21 him.

22 Q. So what did you do with the letter?

23 A. Threw it away.

24 Q. When did you throw it away?

25 A. When I went back to my cell after I spoke

1 to Sapien.

2 Q. Did you also write a letter to the FBI?

3 A. No.

4 Q. So there was only one letter?

5 A. Correct.

6 Q. A letter that you gave to Sapien.

7 Did you talk to anyone else about your
8 decision to cooperate with the Government?

9 A. No.

10 Q. Did you discuss it with Jerry Armenta?

11 A. No.

12 Q. Did you discuss it with Grace Duran?

13 A. Eventually.

14 Q. When you say "eventually," when is that?

15 A. Maybe like months and months after I was
16 already cooperating.

17 Q. So tell us about the conversation you had
18 with Sergio Sapien?

19 A. I just revealed to him the plans that Mr.
20 Baca had to assassinate Mr. Marcantel and
21 Santistevan, and everything that had to do with the
22 murder that happened in Las Cruces.

23 Q. Now, when you were asked about whether or
24 not Mr. Baca had planned to kill Gregg Marcantel, in
25 February of 2015, you denied that that was the plan;

1 correct?

2 A. I what?

3 Q. You denied that Mr. Baca had planned to
4 kill Gregg Marcantel; correct?

5 A. No.

6 Q. Let me show you -- I'm going back to
7 Government's Exhibit 1.

8 MS. DUNCAN: Your Honor, I have a different
9 transcript of the same interview that we had done by
10 Bean & Associates. I've given a copy to the
11 Government. At this time, I'd like to introduce this
12 as an exhibit.

13 THE COURT: Is this a duplicate of 1?

14 MS. DUNCAN: It's not, Your Honor. So 1 is
15 a partial transcript of this interview, and we had
16 the entire interview transcribed.

17 THE COURT: Any objection, Ms. Armijo?

18 MS. ARMIJO: We're not objecting to it.

19 THE COURT: All right. Anybody else?

20 All right. Then Mr. Baca's -- Anthony
21 Baca's exhibit -- is that going to be B?

22 MS. DUNCAN: Exhibit B, Your Honor.

23 THE COURT: -- Exhibit B will be admitted
24 into evidence.

25 BY MS. DUNCAN:

1 Q. If I were to show you a transcript of the
2 conversation that you had with the FBI on February
3 19, 2015, might it refresh your recollection of what
4 you said about the hit on Gregg Marcantel?

5 A. Show it to me, yeah.

6 MS. DUNCAN: May I approach, Your Honor?

7 THE COURT: You may.

8 Q. I'm showing you page 45 of Anthony Baca
9 Exhibit B. Let us know when you're done reading it.
10 Did that refresh your recollection of what you said
11 about the alleged hit?

12 A. Yes. Just misunderstood what I was saying.
13 What I meant was Mr. Baca had more hate towards
14 Santistevan than Marcantel; not that he didn't intend
15 to hit Marcantel.

16 Q. Let's put it on the monitor so everyone can
17 see.

18 THE COURT: This is Exhibit B?

19 MS. DUNCAN: This is Exhibit B, Your Honor,
20 page 45.

21 Q. So the Unidentified Female says, "And
22 Marcantel, or the hit was only on Santistevan?

23 And you answered, "No, it was just on
24 Santistevan. But I'm saying he hates Santistevan
25 more than he hates Marcantel." Correct? I'm looking

1 here.

2 THE COURT: Doesn't sound good. Is that
3 the noise to --

4 MR. LOWRY: A cellphone.

5 THE COURT: Oh, that's just a cellphone.

6 MS. BHALLA: I think it's his wife's
7 number, Your Honor.

8 THE COURT: No comment.

9 BY MS. DUNCAN:

10 Q. Did I read that correctly, Mr. Duran?

11 A. I can see it correctly, yeah. It's not
12 what I said, though -- that's not what I meant.

13 Q. So it's what you said; it's just not what
14 you meant?

15 A. No.

16 Q. So you're denying that you said that?

17 A. The way they put it, it might have been
18 said like that. But what I meant was the hit was on
19 both of them, but he had more hate towards
20 Santistevan than Marcantel.

21 Q. So when someone asks you -- I'm not going
22 to argue. I take that back.

23 In September or early -- yes, September of
24 2014, you filed a lawsuit against Gregg Marcantel;
25 correct?

1 A. Correct.

2 Q. And you filed the lawsuit complaining of
3 the conditions of your confinement?

4 A. Correct.

5 Q. That you were under lockdown?

6 A. Correct.

7 Q. And you were being denied visits with your
8 family?

9 A. Correct.

10 Q. Phone calls with your family?

11 A. Correct.

12 Q. And commissary?

13 A. Correct.

14 Q. You also alleged that you were in solitary
15 confinement?

16 A. Correct.

17 Q. And that that was having a detrimental
18 effect on your health?

19 A. Correct.

20 Q. Is that true? At the time, were you
21 suffering detrimental effects of solitary
22 confinement?

23 A. Correct.

24 Q. Tell us about that. What does that mean?

25 A. I believe that was an SNM act. I wasn't

1 the only participant in that suit.

2 Q. So the SNM put you into solitary
3 confinement?

4 A. The SNM filed together.

5 Q. You were the only plaintiff, though.

6 A. I was the only plaintiff?

7 Q. Correct.

8 A. Is that -- yeah, if that's what it says,
9 then I was.

10 Q. And the conditions of confinement at the
11 time were so intolerable that you filed this
12 complaint; is that right?

13 A. Correct.

14 Q. And you were in lockdown; it was a
15 disciplinary status for you and other SNM members
16 following -- or alleged SNM members -- following the
17 Molina murder; correct?

18 A. Correct.

19 Q. So being on disciplinary status meant that
20 the conditions of your confinement worsened?

21 A. I wasn't on disciplinary status.

22 Q. Well, so pending the investigation, you
23 were on lockdown; correct?

24 A. Correct.

25 Q. And if you were on prehearing, like

1 detention for a disciplinary infraction, you'd also
2 be on lockdown?

3 A. Correct.

4 Q. And if you were found to have committed a
5 major violation, then those conditions might continue
6 for you?

7 A. And I wasn't on none of that.

8 Q. You were on prehearing detention --

9 A. I was just on lockdown.

10 Q. In 2015, February of 2015, you were on
11 prehearing detention for the shank; correct?

12 A. Correct.

13 Q. And that was -- at the time of the
14 altercation between you and Mr. Urtiaga, you were on
15 prehearing detention; correct?

16 A. Correct.

17 Q. And you had lost some of your privileges?

18 A. Correct.

19 Q. You had lost your personal property;
20 correct?

21 A. Correct.

22 Q. You didn't -- you had limited visits;
23 correct?

24 A. Correct.

25 Q. And limited phone calls?

1 A. Correct.

2 Q. And, in fact, you were trying to collect
3 pin numbers of other inmates so that you could call
4 your family?

5 A. I don't recall.

6 Q. With respect to the recordings, you said
7 that the recording devices were battery operated;
8 correct?

9 A. Correct.

10 Q. What kind of batteries did they use?

11 A. Triple A.

12 Q. Were you allowed to have triple As while
13 you were in prison?

14 A. Not while we were on PHD, no.

15 Q. Once you were out of PHD, could you have
16 triple A batteries?

17 A. Correct.

18 Q. They weren't contraband?

19 A. Correct.

20 Q. Did you ever ask for replacement batteries
21 for the recording device?

22 A. No.

23 Q. So I know you originally were recording
24 under the instruction of Ms. Brusuelas in early 2015,
25 right?

1 A. Correct.

2 Q. And then Mr. Acee took over in August of
3 2015?

4 A. Correct.

5 Q. What conversations did you have with Mr.
6 Acee about what to record?

7 A. None.

8 Q. So he left what you should record
9 completely to your discretion?

10 A. Acee's information, yeah.

11 Q. Did he tell you what information he wanted?

12 A. Yeah, he told me get the information of the
13 hit.

14 Q. Of which hit?

15 A. On Marcantel.

16 Q. So that was the only thing that you were
17 supposed to get information about?

18 A. All the information.

19 Q. What is all information?

20 A. On the SNM.

21 Q. And how did you get Mr. Baca talking on the
22 recordings?

23 A. I didn't get him to talk anyway. He
24 talked, he talked.

25 Q. Did you talk with Mr. Acee about how you

1 would get Mr. Baca to talk?

2 A. No.

3 Q. What about Joseph Sainato?

4 A. No.

5 Q. And who is Joseph Sainato?

6 A. I don't know. What's his nickname?

7 Q. I don't know. Joseph Sainato, my
8 understanding, is an FBI agent. You've never met Mr.
9 Sainato?

10 A. Oh, Joe? Yeah.

11 Q. Did you have any conversations with Joe
12 about the recordings?

13 A. Yeah, I had conversations with Joe about
14 the recordings, about the clarity of it.

15 Q. And what about the topics that you were to
16 cover with Mr. Baca?

17 A. No.

18 Q. Did Mr. Sainato or Mr. Acee give you
19 instructions on how to use the device?

20 A. I believe Sapien gave me instructions how
21 to use it.

22 Q. And what instructions did Sapien give you?

23 A. On and off.

24 Q. Did they talk to you about how you would
25 know if the battery ran out?

1 A. No.

2 Q. How were the devices picked up from you and
3 given back to you? So let's say this is the first
4 time you got a device, who brought it to you?

5 A. They would go in my cell and shake it down
6 and put one in there, or bring me laundry. Just a
7 variety of ways.

8 Q. Who would do that?

9 A. STIU.

10 Q. Who within STIU?

11 A. Cupit and Sapien, or other people that
12 worked there.

13 Q. How many times did they bring you a
14 recorder?

15 A. Probably like every three days.

16 Q. For what period of time?

17 A. Depending on how much whoever talked. If
18 it was a lot of information, and I felt like I
19 recorded a lot of information, I felt like the
20 battery was going to die, I got a new one.

21 Q. I guess what I'm asking you is how many
22 times did they come and change out the recording
23 device?

24 A. Several.

25 Q. So less than 10? More than 10?

1 A. More than 10.

2 Q. Less than 20? More than 20?

3 A. More than 20.

4 Q. Less than 30? More than 30?

5 A. A lot.

6 Q. Less than --

7 A. I don't recall. I did this for months. So
8 we could say more than 20.

9 Q. So more than 20 --

10 A. Could be 29.

11 Q. And you said over a period of months. Can
12 you remember what period you were making these
13 recordings?

14 A. From February of 2015, all the way till
15 December of 2015; December 3 to be exact.

16 Q. You said that the majority of the
17 conversations you had with Mr. Baca were recorded;
18 correct?

19 A. Correct.

20 Q. Did you record every conversation you had
21 with Mr. Baca about Dwayne Santistevan?

22 A. Yes. I mean, some of it I missed because I
23 didn't have the recorder.

24 Q. So there were periods of time when you did
25 not have a recording device?

1 A. Yes.

2 Q. Which periods of time would that be?

3 A. That would be a grace point for your
4 defendant -- excuse me -- but --

5 MS. SIRIGNANO: I'm sorry, I can't hear
6 what you're saying.

7 Q. What period of time? I'm asking you for a
8 month?

9 A. No, maybe like a day.

10 Q. So do you have any recollection of a
11 conversation you had with Anthony Baca about Dwayne
12 Santistevan that you did not record?

13 A. The majority of it I recorded.

14 Q. That's not my question. I'm asking you do
15 you have a recollection today, as you sit there, of a
16 conversation you had with Anthony Baca about Dwayne
17 Santistevan that is not recorded?

18 A. Correct.

19 Q. You have no memory; that correct?

20 A. I have a memory what he had said that I
21 didn't get to record.

22 Q. So what do you remember?

23 A. I remember he said that he sent a kite from
24 Arizona to "Baby G" in Las Cruces, and told him to
25 hit Marcantel or Santistevan if they ever went into

1 the pod.

2 Q. When did you have that conversation with
3 him?

4 A. When he first got to the facility.

5 Q. And why didn't you record it?

6 A. Because I didn't have a device.

7 Q. How soon after that conversation did you
8 get the device?

9 A. Maybe the next day. I had the cellphone
10 but I couldn't record it.

11 Q. You couldn't use the cellphone to record
12 the conversation?

13 A. Only if I called somebody.

14 Q. Is that the only conversation that you
15 recall having with Mr. Baca about Santistevan that
16 wasn't recorded?

17 A. Correct.

18 Q. What about conversations you had with Mr.
19 Baca about Gregg Marcantel?

20 A. What about them?

21 Q. Were there any conversations you had with
22 him that you didn't record?

23 A. No. The majority of them I recorded.

24 Q. Well, there is a difference between a
25 majority and no --

1 A. Almost all.

2 Q. Do you recall any conversation that you had
3 with him about Dwayne or Mr. Marcantel that wasn't
4 recorded?

5 A. No.

6 Q. How about the same kind of question with
7 respect to Javier Molina? Were all the conversations
8 you had with Anthony Baca regarding Molina recorded?

9 A. Some of them were, due to me not having a
10 device.

11 Q. So do you have a recollection of any
12 specific conversations about Molina that were not
13 recorded?

14 A. I had conversations about how Mr. Baca was
15 upset that "Lazy" and -- "Lazy" didn't get Molina
16 hit.

17 Q. And did you not record that conversation?

18 A. I did not record that. I did not record
19 that Mr. Baca was upset that "Dan Dan" and "Cyclone"
20 didn't get hit. And those were both orders that he
21 gave to "Lazy."

22 Q. And why did you not record those
23 conversations?

24 A. I didn't have a device.

25 Q. When did those conversations take place?

1 A. In between device switch-outs.

2 Q. So how much time would lapse between you
3 giving the device to STIU and them bringing the
4 device back?

5 A. Sometimes they wouldn't bring it back,
6 because they had devices in other places. So I had
7 to wait sometimes.

8 Q. So how --

9 A. I would give them a device. They would
10 download the information and bring back the device.

11 Q. So they would -- you would give them the
12 device, and then there would be a lapse of time, and
13 they would bring you another device?

14 A. Yes. Not a far lapse, but still a lapse of
15 time.

16 Q. What's the biggest lapse of time between
17 you giving them --

18 A. A day.

19 Q. A day. Is that typical or is that long?

20 A. It was long to me.

21 Q. So when they did the other switch-out, was
22 it faster than a day?

23 A. Most of the time it was just a hand-off.

24 Q. So a hand-off meaning you would give them
25 the old device and they would give you the new

1 device?

2 A. Correct.

3 Q. Which was more common to do, a hand-off or
4 for you to give them a device and them to bring
5 another device later?

6 A. Well, I gave them the device; they would
7 give it to Joe, and he would give them a device to
8 give back to me. So sometimes it was an hour.

9 Q. And where were you when you had this
10 conversation with Mr. Baca that you did not record?

11 A. In my cell.

12 Q. Do you recall any other conversations that
13 you did not record regarding Molina?

14 A. No. Are you talking about at this time, or
15 period? Like all around? Because I had several
16 conversations with him before I even talked to the
17 FBI. So what --

18 Q. I'm asking you, during the period of time
19 that you were recording Mr. Baca.

20 A. No.

21 Q. When did you first meet Mr. Baca?

22 A. I first met Mr. Baca in -- here in
23 Southern.

24 Q. In what year?

25 A. 2013.

1 Q. And how long were you -- were you in the
2 same pod?

3 A. He was in blue pod. I was in green pod.
4 We were in separate pods.

5 Q. How long were you both in Southern
6 together?

7 A. Six months.

8 Q. And you had not met Mr. Baca before 2013;
9 is that correct?

10 A. Correct.

11 Q. When you were recording Mr. Baca in 2015,
12 you would go days without recording a conversation.
13 Do you recollect that?

14 A. No.

15 Q. So do you think you were recording him
16 every day?

17 A. I wouldn't -- no, not every day.

18 Q. So why would days go by that you didn't
19 record him?

20 A. Because we weren't talking, we weren't
21 really talking.

22 Q. When you were in PNM North in 2015 with Mr.
23 Baca, did you ever go to rec together?

24 A. No.

25 Q. While you were recording Mr. Baca, were you

1 also communicating with Bryan Acee?

2 A. Correct.

3 Q. You were communicating with him on the
4 cellphone that you had in your cell; correct?

5 A. Maybe, when I couldn't call him from the
6 phone, because I was on phone restriction and I
7 needed to call him, yeah.

8 Q. And then you'd also call him on the prison
9 phone?

10 A. Correct.

11 Q. Was there -- did you use any other phone to
12 call Bryan Acee?

13 A. No.

14 Q. How many times do you think you called him
15 on the cellphone?

16 A. Once, maybe twice.

17 Q. And how many times did you call him on the
18 prison phone?

19 A. Maybe about 10.

20 Q. And over what period did you call him 10
21 times?

22 A. Over a period of eight months.

23 Q. So starting when? When is the first time
24 that you would have called?

25 A. I don't recall.

1 Q. Do you recall the last time you would have
2 called Bryan Acee using the prison phone?

3 A. Maybe like August -- or, no, maybe
4 September, 2016.

5 Q. And when you called Mr. Acee using the
6 prison phone, did you make those calls in your cell
7 or somewhere else?

8 A. In my cell.

9 Q. With respect to the cellphone, did you ever
10 delete anything off of the cellphone?

11 A. Not that I recall.

12 Q. Did you ever delete any pictures?

13 A. I might have.

14 Q. When did you do that?

15 A. I don't recall.

16 Q. Why did you do it?

17 A. Just did it. I don't know.

18 Q. Did Mr. Acee ever talk to you about not
19 deleting pictures or texts off the cellphone?

20 A. No.

21 Q. Did he ever talk to you about the
22 importance of preserving evidence?

23 A. I didn't know that was evidence, no.

24 Q. How often did you delete photos or
25 something else off the cellphone?

1 A. Not often.

2 Q. So more than five? Less than five?

3 A. Oh, less than five. Less than two.

4 Q. At any point did you wipe the phone?

5 A. No.

6 Q. So when you deleted things, would you
7 delete one entry or a lot of entries?

8 A. Maybe a picture.

9 Q. Did you ever delete text messages?

10 A. No.

11 Q. Did you ever delete the phone logs showing
12 who you had called or who called you?

13 A. No.

14 Q. Do you remember which pictures you deleted?

15 A. Just pictures I took of myself that I
16 didn't like.

17 Q. Did you delete pictures that people had
18 sent to you?

19 A. No.

20 Q. So those would still be on the phone?

21 A. They should. I don't think no one sent me
22 pictures, though.

23 Q. Did anyone named Felicia send you pictures?

24 A. Possible. I don't recall.

25 Q. When you spoke to the FBI about the Molina

1 homicide, you had discussed that homicide with Jerry
2 Armenta; correct?

3 A. Wait, what? Oh, when I spoke to them, I
4 had talked to Jerry Armenta about it?

5 Q. That's correct. You spoke to the FBI after
6 talking to Jerry Armenta; correct?

7 A. Yeah, and everybody else.

8 Q. Jerry Armenta was next to you?

9 A. I already knew about it before I spoke to
10 him.

11 Q. But I asking, Jerry Armenta was next to
12 you, right?

13 A. Yes.

14 Q. And you discussed the Molina homicide with
15 him?

16 A. Correct.

17 Q. You weren't in Southern at the time that
18 Molina was murdered, were you?

19 A. No, I was just around when the paperwork
20 was getting passed around.

21 Q. Where were you around when paperwork was
22 getting passed out?

23 A. I was in 1B with "Spider," when the
24 paperwork got passed to Southern.

25 Q. So did you see the paperwork?

1 A. I did.

2 Q. Did you see the paperwork get delivered to
3 "Spider"?

4 A. No.

5 Q. Did you see "Spider" deliver the paperwork
6 to anyone else?

7 A. No.

8 Q. Have you ever gone by the name of Johnny
9 Joe Lucero?

10 A. Yes.

11 Q. Were you arrested in Texas under the name
12 of Johnny Joe Lucero?

13 A. Yes.

14 Q. And charged with armed robbery; is that
15 correct?

16 A. Yes.

17 Q. And late last year, you were supposed to
18 meet with your FBI handler and parole officer, and
19 you failed to appear; correct?

20 A. Correct.

21 Q. And then -- that was in late November of
22 last year?

23 A. Yes.

24 Q. And then you were arrested on December 15
25 of last year?

1 A. Correct.

2 Q. How were you arrested?

3 MR. DEL VALLE: Objection, Your Honor.

4 That case is still pending. And I'm going to ask
5 counsel not to inquire about that case because it is
6 still pending.

7 THE COURT: How does, really, him -- how he
8 was arrested in that case, how does that really help
9 me with the voluntariness issue here?

10 MS. DUNCAN: I think -- well, a couple
11 things, Your Honor. I think one, the fact that the
12 arrest goes to his credibility as a witness. It also
13 goes to the ongoing coercion that we're arguing is in
14 play with respect to his statements. So I'm not
15 asking him about what he did. I'm asking about the
16 circumstances of him being arrested.

17 THE COURT: Well, I think the "how" I will
18 sustain.

19 Q. Now, you are currently facing a parole
20 violation in your most recent criminal case here in
21 New Mexico; correct?

22 A. Correct.

23 Q. You're also facing possible charges for
24 possession of heroin, and being a felon in possession
25 of a firearm; correct?

1 A. Correct.

2 Q. And you're facing possible child abuse
3 charges in Portland, Oregon; correct?

4 A. Not to my knowledge.

5 Q. You're being investigated for an allegation
6 that you hit your stepdaughter, Ivy; correct?

7 MR. DEL VALLE: Again, I'm going to make
8 the same objection, Your Honor.

9 THE COURT: Yeah, if he's -- if these are
10 other charges that he's facing, I'm reluctant to have
11 him be compelled to testify about some other possible
12 criminal activity. So I'll sustain.

13 MR. DEL VALLE: Thank you.

14 Q. You're aware that -- so the shank that --
15 you were found in possession of a shank in 2015;
16 correct?

17 A. Correct.

18 Q. And you could still be charged in New
19 Mexico State Court with possession of that shank;
20 correct?

21 A. Correct.

22 MS. DUNCAN: If I could have a moment, Your
23 Honor?

24 THE COURT: You may.

25 Q. Were you ever housed with other cooperating

1 witnesses in this case?

2 A. Correct.

3 Q. And when you were housed with them, did
4 they have tablets with discovery on them?

5 MS. ARMIJO: Your Honor, I'm going to
6 object. That's beyond the scope of the hearing.
7 It's just a fishing expedition now. The tablets were
8 not until well after these recordings.

9 THE COURT: How does this relate to the
10 motion?

11 MS. DUNCAN: Sure. Your Honor, Mr. Duran
12 has volunteered that he's talked to everybody and
13 their cousin about the allegations in this case, and
14 I -- to sort of buffer his credibility. And it's our
15 position that a lot of the information he got would
16 have come from those tablets. So it really goes to
17 credibility for purposes of this hearing.

18 THE COURT: Well, I'm going to sustain it.
19 I'm not seeing how that's going to help me make the
20 determination on these two motions. So sustained.

21 Q. When you had the recording device and you
22 were next to Mr. Baca at PNM North, did you ever
23 record any conversations between Roy Martinez and
24 Anthony Ray Baca?

25 A. No.

1 MS. DUNCAN: I have no further questions,
2 Your Honor.

3 THE COURT: Thank you, Ms. Duncan.

4 Anyone else have questions of Mr. Duran on
5 this motion?

6 Mr. Maynard.

7 EXAMINATION

8 BY MR. MAYNARD:

9 Q. Mr. Duran, just a couple of questions. You
10 testified that, of course, there were time periods
11 when you had conversations with Mr. Baca that were
12 not recorded?

13 A. Correct.

14 Q. And, of course, you can't remember all the
15 ones that were recorded, much less the ones that were
16 not recorded?

17 A. Correct.

18 Q. And if I understood your testimony, you
19 said that there was a conversation you had with Mr.
20 Baca, and he was upset with "Lazy," or he had some --
21 mentioned something about "Lazy"?

22 A. Correct.

23 Q. For not moving on Mr. Molina, or something
24 of that nature?

25 A. Correct.

1 Q. And that was not recorded?

2 A. Correct.

3 Q. And you didn't have that recorded and
4 erased by any chance?

5 A. I didn't have a device to record it.

6 Q. All right. When was that conversation,
7 more or less?

8 A. When he first came back, and -- yeah, when
9 he first came back, and then some when he was in
10 Southern with me.

11 Q. And what year was this?

12 A. 2015 and 2013.

13 Q. This was more than a year?

14 A. Right.

15 Q. After Mr. Molina had died?

16 A. 2015?

17 Q. No, the conversation was more than a year
18 later.

19 A. The conversation I didn't record happened
20 in 2015.

21 Q. Right.

22 MR. MAYNARD: Thank you.

23 THE COURT: Thank you, Mr. Maynard.

24 Anyone else? Mr. Villa?

25 MR. VILLA: I'll let Ms. Sirignano go

1 first.

2 THE COURT: All right. Ms. Sirignano.

3 EXAMINATION

4 BY MS. SIRIGNANO:

5 Q. Good morning, Mr. Duran.

6 A. Good morning.

7 Q. You said that you would speak to your
8 handler, Bryan Acee, on the jail phone; correct?

9 A. Correct.

10 Q. What's a house phone?

11 A. A jail -- a house phone that's in the pod.

12 Q. It's the jail phone in the pod?

13 A. Correct.

14 Q. Is it recorded?

15 A. Yes.

16 Q. Did you ever speak to Mr. Acee on an
17 unrecorded line?

18 A. Very rarely.

19 Q. So how many times?

20 A. Maybe once.

21 Q. And what was the content of that
22 conversation?

23 A. I don't recall.

24 Q. Do you know when it was?

25 A. When it was?

1 Q. Yes.

2 A. No. Maybe at the beginning, when I first
3 started working with him.

4 Q. And you don't remember what you talked to
5 him about on an unrecorded line?

6 A. No, it wasn't really of importance.

7 Q. Okay. And did you ever speak to any other
8 law enforcement on an unrecorded line?

9 A. No.

10 Q. Did you ever speak to Mr. Acee over text
11 messages?

12 A. Maybe once or twice.

13 Q. And how would you communicate with the FBI
14 generally?

15 A. They would just come get me.

16 Q. Where would they come get you?

17 A. From my cell, and take me to the office.

18 Q. Which office?

19 A. In Albuquerque.

20 Q. And how many times did you travel from PNM
21 to the FBI?

22 A. Maybe like five times.

23 Q. About five times. And can you say when
24 those trips happened?

25 A. I went once in May, twice in August, and in

1 November, I think.

2 Q. 2015?

3 A. Yeah, once.

4 Q. Okay. That's four times.

5 A. About four or five times.

6 Q. Can you remember another time?

7 A. I can't recall another time.

8 Q. And what were these trips about?

9 A. To obtain the cellphone, debrief -- brief
10 them on what was going on.

11 Q. What do you mean by "what was going on"?

12 A. I mean, most of these were just my
13 first-time interviews with them. I met one time with
14 Bryan. And the same week I went and met with Bryan
15 and Ms. Armijo. And then the next time I went was
16 just tell them what was going on.

17 Q. Was the Government and Mr. Acee listening
18 to your recordings at the same time you were making
19 them, contemporaneously?

20 A. Not really, no.

21 Q. No? How do you know that?

22 A. Because. I don't know, didn't seem like
23 it.

24 Q. When were they listening to your
25 recordings?

1 A. I don't think they listened to it. I think
2 they had a separate person listening to it and
3 operating the recordings, which was Joe.

4 Q. The FBI Agent Joe?

5 A. Correct.

6 Q. Sainato?

7 A. Correct.

8 Q. He was the one listening?

9 A. He was the one, yes.

10 Q. How do you know that?

11 A. Because he would talk to me about clarity.

12 Q. And what would he say to you about clarity?

13 A. Just "try to get better," you know "better
14 clarity within the recordings. Try to get closer."

15 Q. Because he was having trouble listening --
16 hearing them?

17 A. He could still hear them, but he didn't
18 hear them as clear as he wanted to.

19 Q. Do you know if your initial meeting with
20 Sapien from STIU was recorded?

21 A. I don't.

22 Q. Would the FBI tell you what was going on
23 with their case when you met them?

24 A. No.

25 Q. So it was mostly you telling them what was

1 going on within the facility?

2 A. Correct.

3 Q. Did you ever record Mr. Garcia -- or did
4 you ever not record Mr. Garcia in any of your
5 conversations with him?

6 A. He always got recorded.

7 Q. So you said that December -- in December
8 2015, you stopped recording; correct?

9 A. Correct.

10 Q. What day was that?

11 A. December 3.

12 Q. And how did you stop recording?

13 A. Because they came and got the cellphone and
14 the device from me.

15 Q. Who did?

16 A. STIU.

17 Q. Who?

18 A. Sapien and Cupit.

19 Q. And did they tell you anything why they
20 were picking up the device?

21 A. Yeah, because they just rounded everybody
22 up.

23 Q. And after they picked up the cellphone and
24 the device, how did you get in touch with your
25 handler?

1 A. I didn't.

2 Q. You didn't?

3 A. No.

4 Q. After the roundup, when was the next time
5 you spoke to your handler?

6 MS. ARMIJO: Your Honor, I'm going to
7 object as beyond the scope. We're now beyond where
8 he gave up -- when everybody was rounded up. We're
9 beyond the scope of his testimony and the
10 voluntariness of this statement.

11 THE COURT: How does it relate to that, Ms.
12 Sirignano?

13 MS. SIRIGNANO: Well, I'm just trying to
14 figure out how often he spoke to Mr. Acee after the
15 roundup.

16 THE COURT: Well, I know what you're trying
17 to get, but it doesn't seem to me it's relevant to
18 the two motions. So I'll sustain.

19 Q. And you testified previously that Mr. Acee
20 didn't tell you not to delete anything off the
21 cellphone?

22 A. Yeah, he didn't. Yeah, he didn't say to or
23 not to.

24 MS. SIRIGNANO: Okay. Thank you. Pass the
25 witness.

1 THE COURT: Thank you, Ms. Sirignano.

2 Anyone else? Mr. Villa?

3 MR. VILLA: Thank you, Your Honor.

4 EXAMINATION

5 BY MR. VILLA:

6 Q. Good afternoon, Mr. Duran.

7 A. Good afternoon.

8 Q. So December -- was it December 2, 2015 that
9 STIU, Sapien, and Cupit came and took the recording
10 device?

11 A. It was the day when they came and rounded
12 them up. I believe it was December 3.

13 Q. Of 2015?

14 A. Right.

15 Q. Where were you? Which pod were you in?

16 A. I was in the pod right next to Mr. Baca in
17 Q pod, I believe.

18 Q. Q pod at Level 6?

19 A. Q pod 3A, yes.

20 Q. Before Q pod, were you in X pod?

21 A. Correct.

22 Q. In 2015?

23 A. Correct.

24 Q. When did he get moved from X to Q?

25 A. I don't recall.

1 Q. When you were in X pod, was Rudy Perez
2 there as well?

3 A. No.

4 Q. So the time you were in X pod, it's your
5 testimony that Mr. Perez was not in X pod at the same
6 time?

7 A. Oh, yeah, he was there.

8 Q. In 2015?

9 A. Yeah, he was in X pod.

10 Q. In the fall?

11 A. Correct.

12 Q. Did you speak to Mr. Perez during the time
13 you were both housed together?

14 A. Yeah, briefly.

15 Q. Did you ever attempt to record him?

16 A. No.

17 Q. Did you speak to Mr. Perez about the Javier
18 Molina murder?

19 A. No.

20 Q. While you were in X pod, did you speak to
21 other people about the Javier Molina murder?

22 A. Yeah.

23 Q. Who did you speak to?

24 A. I spoke to Mario Rodriguez.

25 Q. Mario Rodriguez who also goes by "Blue"?

1 A. Correct.

2 Q. Was Timothy Martinez also there?

3 A. Yes, I spoke to him, too.

4 Q. Spoke to him about the murder?

5 A. Yes.

6 Q. What about Roy Martinez, "Big Shadow"?

7 A. No.

8 Q. Was Mr. Martinez, either Roy or Rob, there
9 in X pod?

10 A. They were both there, but never really
11 spoke too much about the Molina murder.

12 Q. Was there a conversation about the Molina
13 murder concerning that -- this idea that there was a
14 hit out on Molina prior to the time he had actually
15 been killed?

16 MS. ARMIJO: Your Honor, I'm going to
17 object to a fishing expedition. Again, this doesn't
18 get to selective recording as to Mr. Baca or the
19 duress of him initially cooperating. It's now a
20 fishing expedition.

21 THE COURT: Well, it seems like it's more
22 discovery.

23 MR. VILLA: Well, I think it does get to
24 the selective recording, Your Honor, in that he
25 didn't record -- I guess I have to ask him whether he

1 recorded it or not.

2 THE COURT: Why don't you see if you can
3 lay some foundation, and then we'll see if we will
4 let you ask this question.

5 MR. VILLA: Well, I think I just need to
6 establish whether he had a conversation about it. I
7 think his answer was yes.

8 A. And it was recorded.

9 Q. I'm sorry?

10 A. It was recorded.

11 Q. It was recorded?

12 A. Every time I spoke to him, it was recorded.

13 Q. And I'm talking about the idea that there
14 was a hit out on Molina a couple years before he
15 actually was killed.

16 A. Not a couple years. I don't know about a
17 couple years.

18 Q. Well, a long period of time. Maybe a year,
19 a long period of time.

20 A. Whatever involved Molina was recorded.

21 Q. Anytime you talked about Molina?

22 A. Correct.

23 Q. And does that include this -- was there --
24 this previous hit on Molina, did it have to do with
25 Jesse Sedillo and Benjamin Clark?

1 A. It did on some points, yes.

2 Q. The two of them were supposed to be part of
3 carrying it out?

4 A. No, I believe that Mr. Sedillo -- or Jesse
5 Sedillo and -- no, another Jesse was the one that was
6 supposed to provide the paperwork. That's what
7 everybody was thinking.

8 Q. Is that the Jesse that goes by "Croc"?

9 A. No.

10 Q. Who is "Croc"?

11 A. Just an SNM member.

12 Q. Is that Jesse Sedillo?

13 A. Correct.

14 Q. But Jesse Sedillo was not involved in any
15 way, as far as you know, with this previous hit on
16 Javier Molina?

17 MS. ARMIJO: Objection. Fishing
18 expedition.

19 THE COURT: Well, I'm going to allow this.
20 I see some connection here. Overruled.

21 A. Mr. Baca was upset at the fact that "Croc"
22 had received the paperwork to assassinate Mr. Molina
23 and didn't show it to anybody.

24 Q. Okay. And was this paperwork that got to
25 "Croc" some period of time prior to the actual hit on

1 Mr. Molina?

2 A. Correct.

3 Q. And maybe it was two years, maybe it was a
4 year, but it was a decent period of time?

5 A. Correct.

6 Q. And you recorded that conversation with Mr.
7 Baca?

8 A. No, not Mr. Baca.

9 Q. But you just testified that Mr. Baca was
10 upset about it, right?

11 A. Yeah. I didn't say I recorded him saying
12 it. No. You asked me if I recorded the conversation
13 about the Molina murder, and who I talked to about
14 it. I talked to Mario Rodriguez and I talked to
15 Timothy Martinez about the murder. Both of those
16 individuals are the ones I recorded.

17 Q. And were they the individuals that told you
18 Mr. Baca was upset?

19 A. Correct.

20 Q. And you recorded that conversation?

21 A. I already knew he was upset, and I recorded
22 the conversation. But they knew he was upset.

23 Q. But you did not speak to Mr. Baca about
24 whether he was upset?

25 A. Yes.

1 Q. When did you do that?

2 A. In 2013.

3 Q. So that was before you had a recording
4 device?

5 A. Correct.

6 Q. Was Benjamin Clark also supposed to assist
7 "Croc" in distributing this paperwork to carry out
8 the hit on Mr. Molina?

9 A. I don't know.

10 Q. Did you record anybody discussing that?

11 A. No.

12 Q. At no point in time?

13 A. Nothing that involved Benjamin Clark.

14 Q. Did you ever have a conversation before you
15 had the recording device about something involved
16 Benjamin Clark and Javier Molina?

17 A. No.

18 Q. When you spoke to Mr. Perez briefly in the
19 X pod, in the fall of 2015, what did you speak to him
20 about?

21 A. Random activities within the SNM. Nothing
22 about the murder.

23 Q. Was this during the same time that you had
24 recorded Timothy Martinez and Mario Rodriguez?

25 A. Mario Rodriguez was his neighbor. So no, I

1 didn't really pay attention to him.

2 Q. But, I mean, is this the same time frame
3 that you recorded Mario Rodriguez?

4 A. Right.

5 Q. Talking about what "Croc" was supposed to
6 do with the paperwork on Javier Molina?

7 A. Right.

8 MR. VILLA: That's all the questions I
9 have.

10 THE COURT: All right. Thank you, Mr.
11 Villa.

12 Anyone else from the defendants that wants
13 to cross-examine Mr. Duran on these two motions?

14 All right. Mr. Del Valle, do you have
15 anything you need to clarify?

16 MR. DEL VALLE: No, Your Honor.

17 THE COURT: All right. Did you have
18 something else, Mr. Lowry?

19 MR. LOWRY: No, Your Honor.

20 THE COURT: Hold on just a second. Did you
21 have something else, Ms. Duncan?

22 MS. DUNCAN: No, Your Honor.

23 THE COURT: Mr. Lahann, were you just
24 letting Mr. Villa in?

25 All right. Ms. Armijo.

1 REDIRECT EXAMINATION

2 BY MS. ARMIJO:

3 Q. Mr. Duran, at the time that you initially
4 spoke to Special Agent Brusuelas, were you already in
5 restrictive housing?

6 A. I was.

7 Q. And why was that?

8 A. That's where they had us for the Molina
9 murder.

10 Q. When you say "us," who are you referring
11 to?

12 A. SNM.

13 Q. All right. And was -- after you had
14 decided to cooperate, did you immediately change your
15 behavior in front of other SNM members?

16 A. No.

17 Q. And why not?

18 A. Because it would put me in danger of
19 getting killed.

20 Q. Now, you talked about -- a little bit with
21 Ms. Duncan about suing because of the SNM conditions.
22 Was that -- what year was that?

23 A. That was when the Molina murder had first
24 taken place, which was maybe a month after that. So
25 maybe like March.

1 Q. And you spoke a little bit about "Lazy."
2 And just for the record, who is "Lazy"?

3 A. Carlos Herrera.

4 Q. And you said -- I believe you were talking
5 about "Lazy" didn't get Molina hit. What did you
6 mean by that?

7 A. He didn't get him hit. He was supposed to
8 get him hit. He had orders from Baca to get him hit.
9 And he didn't get him hit.

10 Q. And when you say "hit," what do you mean?

11 A. Hit, you know, like killed.

12 Q. Okay.

13 A. Assassinated.

14 Q. Okay. So we're not talking just going and
15 getting him hit as far as a punch. Are we talking
16 about murder?

17 A. Murder.

18 Q. Or killed?

19 Okay. And then -- and when did you learn
20 that information, initially?

21 A. 2013.

22 Q. And who did you learn it from?

23 A. Mr. Baca.

24 Q. Now, you mentioned "Dan Dan" and "Cyclone."
25 What were you referring to about them?

1 A. Mr. Baca had felt that Daniel Sanchez and
2 Benjamin Clark had dropped kites on him and prevented
3 him from hitting the Level 4, when they were at the
4 South. And he was upset about that and wanted him
5 hit.

6 Q. Okay. So you're talking -- just so that
7 we're clear, Mr. Baca wanted Daniel Sanchez and
8 Benjamin Clark hit as well?

9 A. Correct.

10 Q. And when did you learn that?

11 A. In 2013.

12 Q. And when you say drop a kite, what do you
13 mean?

14 A. Drop a kite, like to STIU, or --

15 Q. You used --

16 A. Just write a letter to inform officers.

17 Q. Okay. So drop a kite is a way of
18 communicating to other people?

19 A. Drop a kite is a way of telling.

20 Q. Okay. Now, the phone that you had, that
21 you were given by FBI, were you aware that all of
22 your text messages and your calls were being recorded
23 by a court order?

24 A. Strict, yes.

25 Q. And you talked a little bit about photos.

1 Did you take any photos on them -- on that phone?

2 A. I did.

3 Q. Okay. And tell us the circumstances of
4 those photos, and how many, if you recall.

5 A. They were just selfies. I just treated the
6 phone as if it was a real cellphone, for Mr. Baca to
7 believe it was a real cellphone.

8 Q. Okay. And did you send any of those
9 selfies out to anybody?

10 A. I sent those selfies to Mr. Baca's cousins,
11 and someone that Mr. Baca had befriended, a girl that
12 he hooked me up with.

13 Q. Okay. Who was Mr. Baca's cousin?

14 A. I forgot her name.

15 Q. Okay.

16 A. I don't recall it.

17 Q. I'm sorry?

18 A. I don't recall her name.

19 Q. How did you know to get ahold of her?

20 A. Through him.

21 Q. Okay. And so what was your point in
22 sending her a selfie, with Mr. Baca giving you her
23 number? What was the point of that?

24 A. Just to make the phone look real,
25 basically.

1 Q. Okay. And Ms. Duncan asked you --

2 THE COURT: How much longer do you think
3 you're going to go?

4 MS. ARMIJO: Your Honor, I just have a
5 couple more questions.

6 THE COURT: All right. Go ahead.

7 Q. Ms. Duncan mentioned Johnny Joe Lucero, and
8 an arrest that you had. How old were you at that
9 time?

10 A. I was 17 years old.

11 Q. And when the phone was picked up, the day
12 of the roundup -- you referred to that -- when you
13 say roundup, was that when SNM Gang members were
14 initially arrested in this case?

15 A. Correct.

16 Q. At the time of the roundup, was there a
17 shakedown of all SNM members at PNM?

18 A. Correct.

19 Q. Was the cellphone taken as part of that?

20 A. The cellphone was taken immediately after
21 Baca was removed from his cell.

22 Q. At that time did any other -- were you
23 aware if any other of the people that were arrested
24 knew you were cooperating at that time?

25 A. Nobody knew, to my knowledge.

1 Q. Okay. When you talked about -- and lastly,
2 you talked about recordings that you had with Mario
3 Rodriguez and Timothy Martinez. And you said that
4 you used the recorder. Are you aware of whether or
5 not some of the recordings, maybe the batteries died
6 and it didn't get captured?

7 A. That was one of the incidents that the
8 battery died.

9 MS. ARMIJO: All right. I have nothing
10 further.

11 THE COURT: All right. Thank you, Ms.
12 Armijo.

13 All right. Mr. Duran, you may step down.
14 Thank you for your testimony.

15 All right. Let's go ahead and take our
16 lunch break. We'll be back in about an hour. It may
17 take a little bit longer getting everybody out. But
18 let's shoot for an hour. Have a good lunch.

19 (The Court stood in recess.)

20 THE COURT: All right. I think everyone
21 has got an attorney. Help your co-defendants out,
22 make sure everybody has got an attorney.

23 All right. Let me go ahead and make an
24 oral ruling on the motion to disqualify Mr. Lowry.
25 Lawyers appearing before the Court in a criminal case

1 are subject to the New Mexico Rules of Professional
2 Conduct. And there are two ways that a
3 representation can violate a lawyer's ethical duties
4 to a former client under those rules. First, under
5 Rule 16-109(a), a lawyer cannot represent a client in
6 a matter in which the lawyer represented a former
7 client, or in a substantially related matter, if the
8 current client's interests are materially adverse to
9 the former's client interests. Whether two
10 representations are in the same matter depends on
11 whether the lawyer can be justly regarded as changing
12 sides. One matter is substantially related to
13 another if it involves the same dispute, or if there
14 is a substantial risk that confidential factual
15 information, as would normally have been obtained in
16 the prior representation, would materially advance
17 the client's position in the subsequent matter.

18 Section 132 of the Restatement Third of the
19 Law Governing Lawyers puts it, I think, a little
20 bit -- from a syntax sort of way, a little bit better
21 than maybe the New Mexico rules do. But the current
22 matter is substantially related to the earlier matter
23 if, one, the current matter involves the work the
24 lawyer performed for the former client. I think that
25 was the problem with Mr. Davis' representation. Or,

1 two, there is substantial risk that representation of
2 the present client will involve the use of
3 information acquired in the course of representing
4 the former client, unless that information has become
5 generally known. And that's the Restatement Third,
6 Section 132.

7 Mr. Duran's civil case is not the same
8 matter as Mr. Baca's prosecution. The civil case,
9 likewise, does not involve the dispute, as Mr. Baca's
10 prosecution. While it is theoretically possible that
11 confidential information gained by Mr. Donatelli
12 while representing Mr. Duran would be helpful to Mr.
13 Baca's defense, that possibility does not amount to a
14 substantial risk that Mr. Baca's defense will involve
15 such information because Mr. Duran's civil case did
16 not involve the SNM, or otherwise implicate
17 Mr. Duran's expected testimony. Accordingly, the
18 Court concludes that Mr. Lowry's representation of
19 Mr. Baca does not offend Rule 16-109(a).

20 Second, under Rule 16-109(c), a lawyer
21 cannot use or reveal a former client's confidential
22 information. The Court credits Mr. Lowry's assertion
23 that he is aware of no confidential information
24 regarding Mr. Duran. Moreover, the risk that Mr.
25 Lowry would use or reveal such information, even if

1 he had it, is minimal, because he will not
2 cross-examine Mr. Duran.

3 The Court is confident that Mr. Lowry, as
4 an officer of the Court, will inform the Court if his
5 recollection regarding Mr. Duran's confidential
6 information is refreshed before or during trial.
7 Accordingly, the Court concludes that Mr. Lowry's
8 representation of Mr. Baca does not offend Rule
9 16-109(c).

10 I want to get the further waiver of
11 Mr. Baca. But assuming that comes through, then Mr.
12 Baca will have waived any conflict of interest
13 stemming from Mr. Donatelli's representation of
14 Mr. Duran, so Mr. Lowry's continued representation of
15 Mr. Baca does not offend Mr. Baca's rights under the
16 Sixth Amendment.

17 Mr. Duran is not charged in this case. I'm
18 going to think through a little bit about whether he
19 still has some Sixth Amendment rights in this case.
20 So I'll continue to give that some thought as to
21 whether he has a right under the Constitution to
22 anything in this case.

23 But, in any case, the Court has appointed
24 Mr. Del Valle to represent Mr. Duran, so Mr. Duran
25 has, in fact, been afforded conflict-of-interest-free

1 counsel. So, accordingly, the Court concludes that,
2 even though Mr. Duran refused to waive any conflict,
3 Mr. Lowry's representation of Mr. Baca does not
4 offend the Sixth Amendment.

5 All right. We also had some issues, as far
6 as Mr. Duran, that we wanted to take up. I am not
7 sure I'm familiar with them. So you may have told
8 Ms. Wild, and it may have gone into my ear, and I
9 didn't register it. But this sounds new to me.

10 MS. ARMIJO: Your Honor I, believe it's a
11 little new. And I have been informing defense
12 counsel for Mr. Baca about the issue, because I
13 believe it was their motion. The Court -- we had
14 previously -- it was a motion for Mr. Duran's medical
15 and mental health records. And the Court did, in
16 fact, order them. That was prior to Mr. Duran having
17 counsel and weighing in on the issue. And I'll let
18 Mr. Del Valle speak to it. But I believe that
19 Mr. Duran -- and we actually have them -- "we" being
20 the U.S. Attorney's Office. They were sent to us by
21 Corrections after the Court had issued the order.
22 But I believe that Mr. Duran is objecting to the
23 release of those items. And I'll let Mr. Del Valle
24 speak to that. So -- and I do know that mental
25 health records require extra care when being ordered

1 to be released. And so I'll let Mr. Del Valle
2 address those issues.

3 THE COURT: All right. Mr. Del Valle.

4 MR. DEL VALLE: Thank you, Your Honor.

5 Mr. Duran objects to the release of any
6 medical records whatsoever as a violation of his
7 privacy rights under HIPAA.

8 Additionally, let me kind of loop back on
9 the conflict issue. Although I'm not sure, I would
10 assume that during the representation of Mr. Duran by
11 Mr. Lowry's firm, the issues of mental health and
12 medical records were part of the lawsuit, as they
13 typically are in terms of mental damages, pain and
14 suffering, and so forth. If they have any special
15 knowledge of those things, that would enhance the
16 concept of a conflict.

17 That's all I have to say on that matter.
18 But it's another consideration for the Court that we
19 really don't know how far those medical records go
20 back at this time, whether they were, in fact,
21 generated by that firm.

22 And so, again, I repeat that he does object
23 to the release of his medical records. Thank you.

24 THE COURT: All right. Thank you, Mr. Del
25 Valle. Did -- Ms. Duncan, Mr. Lowry, are y'all the

1 ones that subpoenaed the medical records?

2 MS. DUNCAN: Your Honor, we didn't subpoena
3 them. We had an agreement with the Government that
4 they would produce them, if the Court would sign the
5 order for their production. So the Court signed the
6 order. Ms. Armijo represented the records made it
7 from DOC to the U.S. Attorney's Office, and then the
8 U.S. Attorney's Office did not disclose them to us.

9 THE COURT: Say that again. What did you
10 say?

11 MS. DUNCAN: We stipulated, when we were
12 arguing discovery, we had asked for them, and the
13 parties came to an agreement that if the Court would
14 issue an order for their production, then DOC would
15 give them to the U.S. Attorney's Office, and the U.S.
16 Attorney's Office would give them to us.

17 So, yes, we were the ones who asked for
18 them, but it was just pursuant to a order that's been
19 entered.

20 THE COURT: What are you looking for in his
21 medical records? What is it that you're wanting to
22 see, and how are they relevant to, I guess it would
23 be these two motions; correct?

24 MS. DUNCAN: No, Your Honor, actually this
25 is a separate issue. We had asked for the medical

1 and mental health records for trial, for impeachment
2 purposes, so as they bear on his credibility as a
3 witness and they bear on his ability to recollect.
4 The Court saw today that he has trouble recollecting
5 events. And the medical and mental health records
6 would bear on that issue.

7 THE COURT: Well, anybody else want to
8 weigh in on this issue? Did you have anything else?

9 MS. DUNCAN: No, Your Honor.

10 THE COURT: Anything else you want to weigh
11 in on this issue?

12 Anything else you have, Ms. Armijo?

13 MS. ARMIJO: No. I don't know -- if it's
14 just for impeachment purposes, I guess an alternative
15 would be for the Court to do an in camera review of
16 them. But I believe it is substantial amount of
17 reviewing. As you may recall, there was testimony
18 with Mr. Roark, I believe, for that motion to
19 suppress, that indicated that, when these inmates are
20 being held in Level 6, that they go and they
21 routinely have a mental health evaluation to
22 determine how they are. So --

23 THE COURT: For whose benefit is that,
24 though? Is that for the prison, or is that for the
25 prisoner?

1 MS. ARMIJO: I think that's for the
2 prisoner's benefit.

3 THE COURT: So does the prison see those
4 records, though, and use them in evaluating whether
5 somebody is deteriorating or not?

6 MS. ARMIJO: The prison doesn't see them
7 themselves. I believe that -- and that was part of
8 the issue, is that the NMCD does not have custody of
9 them. It's a completely different company that does
10 the medical work. Obviously, if there is issues as
11 to an inmate, then I think the protocol would be to
12 notify Corrections that there is issues with an
13 inmate, and then it would be dealt with. But I know
14 that that is routine with all of the inmates. I'm
15 sure all of these people probably have mental health
16 records, because they've all been held in Level 6
17 capacity. So -- and I don't know what else is there,
18 obviously, because I have not personally sat down and
19 reviewed them. But that is an alternative.

20 THE COURT: Have I already signed the
21 order?

22 MS. ARMIJO: You did sign the order, Your
23 Honor. But that was before Mr. Duran weighed in on
24 the issue and had counsel to advise him.

25 THE COURT: Well --

1 MR. CASTLE: Your Honor, I'm sorry. I
2 didn't jump up quick enough. I'm wondering if I
3 could help the Court a little bit.

4 THE COURT: All right.

5 MR. CASTLE: Your Honor, on behalf of Mr.
6 Garcia, we have requested such records regarding
7 Eugene Martinez, who had been a defendant in the
8 case. And the Court authorized a process by which
9 his counsel reviewed the records, and then made
10 suggested redactions. And we're in the process of
11 that.

12 But the law on this issue was set forth in
13 a motion we filed, which is Document 1163, which is
14 our Giglio motion. And what we cited was the case of
15 United States v. Robinson, a Tenth Circuit case, 583
16 F.3d 1265, in which they stated that evidence that a
17 confidential informant has suffered from a mental
18 illness was relevant because it would provide some
19 significant help to the jury in its efforts to
20 evaluate the informant's ability to perceive or to
21 recall events or to testify accurately.

22 In addition to that case, they talked about
23 evidence of illegal drug use also being relevant in
24 that context. And I don't know if this is Your
25 Honor's case, but -- I imagine you'd remember it --

1 the last name is United States v. Ganadonegro.

2 THE COURT: Ganadonegro.

3 MR. CASTLE: If that's this Court's case.

4 It also found that a 2012 U.S. -- well, I have a
5 Lexis cite, which is a New Mexico District of New
6 Mexico case in 2012.

7 In addition, while there is other circuits
8 that we set forth what their position was, but it
9 seems like the circuits, from the Fifth to the
10 Eleventh to the Second, all indicate these kind of
11 records are Giglio materials that should be
12 disclosed.

13 THE COURT: All right. Thank you, Mr.
14 Castle.

15 Well, let's do this: I'm going to leave my
16 order in place. If you want to go through, Mr. Del
17 Valle, and look at the records and either, A -- I'm
18 not inclined to probably allow you to object so that
19 it blocks the production of just medical records.
20 But if you want to make an argument that certain
21 materials are subject to the
22 psychotherapist-psychiatrist privilege, then I'll let
23 you raise those issues. I've written on those as to
24 what the federal law allows, as far as a privilege
25 and what elements have to be met. So you might look

1 at what I have said in the past.

2 Typically, what I do with police records or
3 police reports up in Albuquerque -- and that's the
4 reason I was asking who looks at these things -- if
5 they're made primarily for the Corrections Department
6 to evaluate and decide how long somebody is going to
7 stay in solitary, I'm probably not going to sustain
8 the privilege.

9 On the other hand, if Mr. Duran has a
10 psychiatrist, and he's talking to that person, or a
11 psychologist or a psychotherapist, and only he and
12 the doctor are seeing those reports, and they're not
13 something for the benefit of the use of the prison,
14 then I'll probably sustain it, and keep those records
15 from being produced. But we're going to have to look
16 at them a little closer.

17 So I'll let you look at them before they're
18 produced. But at least at the present time, we'll
19 keep the production order in place.

20 MR. DEL VALLE: If I may, Your Honor?

21 THE COURT: You may.

22 MR. DEL VALLE: I understand that there is
23 approximately 6,000 pages.

24 MS. ARMIJO: No, I think there is a
25 banker's box that has the medical -- and I know that

1 the mental health records were about 600. There is a
2 banker's box. Does that include both? Okay, there
3 is a banker's box full of both. So I don't know how
4 many pages that is, but --

5 MR. DEL VALLE: Just to let the Court know,
6 it will be a while --

7 THE COURT: Okay.

8 MR. DEL VALLE: -- based on the volume.

9 Additionally, while I'm up here, I would
10 like to announce to all counsel that I have
11 undertaken the representation of Grace Duran; that is
12 Mr. Duran's wife. And if anybody wants to contact
13 her, I am now her attorney.

14 THE COURT: Okay.

15 MR. DEL VALLE: Thank you.

16 THE COURT: Thank you, Mr. Del Valle.

17 All right. So I'll leave the production
18 order in place, and give Mr. Del Valle a chance to go
19 through and see if he wants to make a pitch for me
20 keeping some of the documents out. Otherwise, we'll
21 go ahead and keep the production order in place.

22 Ms. Duncan?

23 MS. DUNCAN: Your Honor, I understand that
24 these records are voluminous. But we're only three
25 weeks out from trial. And Mr. Duran is a big witness

1 for the Government against my client. So I'd ask the
2 Court to set a deadline within the next week,
3 week-and-a-half, for that review to get completed, so
4 that we have time to process those records to
5 effectively cross-examine Mr. Duran.

6 THE COURT: Could I set a production of 11
7 days from today for the production of the documents?
8 Does that give you enough time to get through them,
9 Mr. Del Valle?

10 MR. DEL VALLE: I'll have to make time.

11 THE COURT: All right. So 11 days from
12 today the documents will be produced. And by that
13 point, Mr. Del Valle will get through them as much as
14 possible. And otherwise, they will be produced. The
15 ones that he objects to, they can be pulled. You can
16 get the others, pull those, and we'll argue about
17 them at the appropriate time.

18 All right. Ms. Armijo, anything further on
19 that issue?

20 MS. ARMIJO: No, Your Honor.

21 THE COURT: Is the Government ready to go
22 to its next witness or evidence?

23 MS. ARMIJO: Yes, Your Honor.

24 May Mr. Duran be excused?

25 THE COURT: Any objection to Mr. Duran

1 being excused?

2 MS. JACKS: Your Honor, may I just be heard
3 briefly?

4 THE COURT: You may.

5 MS. JACKS: Because I was unaware that the
6 same attorney that was representing Eric Duran was
7 claiming to represent Grace Duran. And that seems to
8 me to be like a conflict situation, given at least
9 what I know about their relationship and the crimes
10 that Mr. Duran has committed against Mrs. -- or Grace
11 Duran and her child.

12 THE COURT: Well, how is -- I need to be
13 educated on this. How is Ms. Duran relevant to this
14 case?

15 MS. JACKS: I think with respect to bias,
16 motive, and rewards offered to Eric Duran, and prior
17 inconsistent statements, or statements on the phone.
18 I'm happy to address it at another time. I just
19 didn't want to let it go by without alerting for the
20 Court that I don't think that's something that, at
21 least most people in this room, would think would be
22 acceptable, for the same lawyer to represent them
23 both.

24 THE COURT: Okay. Any thoughts on that,
25 Mr. Del Valle?

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1 MR. DEL VALLE: Just to advise counsel, I
2 have spoken to Ms. Duran, and I have told her that
3 she can speak to anybody she wants to, and she can
4 not speak to anybody that she doesn't want to speak
5 to, that it is totally up to her, and leave it up to
6 her discretion.

7 She's been subpoenaed to be here on the
8 28th. And unless anybody will withdraw the subpoena,
9 she will obey the subpoena.

10 THE COURT: So she's been subpoenaed for
11 the trial in this case?

12 MR. DEL VALLE: She's been subpoenaed for
13 the 28th. She just sent me a text copy of it.

14 The whole point is that I want to alert all
15 counsel that if they want to speak to her, I have to
16 be present. That's all.

17 THE COURT: All right. Let me start with
18 you, Ms. Jacks. What do you want me to do about this
19 issue?

20 MS. JACKS: I think for the -- to use the
21 Court's time wisely, I think what we ought to do is
22 table it for the moment. Maybe we can provide the
23 Court with some sort of briefing.

24 But I'm even more concerned now, because
25 now we have somebody concurrently representing two

1 people with diverse interests in this proceeding. So
2 at this point, I think the question becomes should
3 this attorney be removed from both representations.
4 So I think we need to look into it.

5 THE COURT: All right. So table it for the
6 present time.

7 All right. Anybody? Mr. Del Valle?

8 MR. DEL VALLE: Just to let counsel know
9 that I'm not shaking in my boots.

10 Thank you.

11 MS. JACKS: Neither am I.

12 THE COURT: All right. So unless somebody
13 thinks otherwise, we'll table it.

14 Mr. Villa.

15 MR. VILLA: Your Honor, I was going to
16 bring up a separate issue.

17 THE COURT: You don't want to table it?

18 MR. VILLA: I want to bring up a separate
19 issue. Maybe before the Government calls the next
20 witness. It has to do with the phone calls that the
21 Government has produced. They produced, I think the
22 first round we're talking, phone calls of our client,
23 phone calls of cooperating witnesses, et cetera,
24 about mid December. There was some issues with those
25 we had to get fixed. And we're all busy going

1 through those. And I can file a motion if the Court
2 wishes.

3 But what I wanted to ask the Court is, if
4 it would have the Government -- give the Government a
5 deadline to tell us which calls of our clients they
6 intend to introduce at trial, or else not be
7 permitted to use any calls of our clients at trial,
8 short of some impeachment issue or something like
9 that.

10 THE COURT: What's your thoughts on that,
11 Ms. Armijo?

12 MS. ARMIJO: Well, Your Honor, I think that
13 that's -- we certainly don't know what's going to
14 become relevant at trial. For instance, Mr. Perez
15 could come up and testify to one thing, and we may
16 need a certain call for his. A lot of calls that
17 were produced were produced at the defense request
18 for jail calls. So we just made a blanket production
19 of jail calls. Certainly, they know the recordings
20 that we're going to use.

21 I can't think off the top of my head of
22 individual calls that we may be using. If we know
23 that we're going to use a call, certainly -- and then
24 I would request, then, the reverse. Maybe we can ask
25 the defense, if they're going to be using calls that

1 we've provided, then they can let us know. Maybe we
2 can enter into a joint agreement. But certainly not
3 just for the Government to notify people of certain
4 calls at this point.

5 THE COURT: Your thoughts on some
6 reciprocal agreement on that?

7 MR. VILLA: Well, a couple things, Judge.
8 I mean, certainly, as we're going through them -- and
9 we have lots of staff doing that -- if we identify
10 something that we think is admissible evidence, we
11 can turn that over to the Government. You know, I'm
12 not talking about impeachment material. I think
13 that's fair game, if Mr. Perez decides to testify and
14 says something different than is in the call. I'm
15 asking about substantive evidence that the Government
16 intends to use of phones calls of our clients. Not
17 cooperators; keep those out. Just our clients'
18 statements that the Government is going to try to use
19 as admissions in the Government's case-in-chief.

20 THE COURT: Could we have this agreement,
21 Ms. Armijo, that for the present time, the Government
22 will not introduce any jailhouse calls using the
23 definition that Mr. Villa just gave, unless it
24 identifies those for the defendant, so we're not
25 going to just have them in its case-in-chief?

1 MR. BECK: Your Honor, I guess I don't know
2 under what authority we would be agreeing to that. I
3 mean, I understand we have an exhibit list that we
4 have to get out, and that may be fluid. But I just
5 don't want to pigeon hole us. I mean, as much as
6 they're saying they have a bunch of staff listening
7 to the calls, we have less staff and --

8 THE COURT: When is your exhibit list due?

9 MS. ARMIJO: Friday.

10 MR. BECK: Yeah, I think Friday.

11 THE COURT: Well, could we just make it
12 that if it's not on the exhibit list, jailhouse calls
13 on an exhibit list, it's not going to be in your
14 case-in-chief?

15 MR. BECK: I think that's -- I mean, I
16 guess that's probably how we're going to operate with
17 all the evidence. So --

18 THE COURT: Live with that?

19 MR. VILLA: I can live with that.

20 THE COURT: Okay. Let's just do that. If
21 we don't see it on the exhibit list, it won't be
22 entered. If something pops up, then we'll deal with
23 it like we do any other evidence that pops up; people
24 try to get it in, and I'll have to make a judgment
25 call at that point.

1 MR. BECK: Yeah, I think that's fine.

2 THE COURT: And this excludes anything you
3 want to do on impeachment. So when the defendants
4 put on their case-in-chief it's fair game, depending
5 upon what they say. But it's just your
6 case-in-chief. Work, Mr. Villa?

7 MR. VILLA: Yes, Your Honor.

8 THE COURT: Anybody have any problem with
9 that? Ms. Sirignano?

10 MS. SIRIGNANO: Your Honor, I do. I'm
11 sorry to be a stick-in-the-mud again.

12 These calls were produced in December,
13 16,000 hours of phone calls. I filed a notice over
14 the break regarding the calls. I attached an email
15 from Mr. Aoki regarding the contents of these phone
16 calls. And, quite frankly, if we had everybody in
17 this room listening to phone calls between now and
18 the 29th, we probably wouldn't get through all of
19 them. What bothers me, Judge -- and I'm just putting
20 this on the record here -- is that Mr. Lowry, when
21 his client was arraigned back on December 4th or
22 5th -- or 3rd of 2015 -- he had asked the
23 Government -- and I was present during the hearing in
24 front of Judge Gonzales where the Government agreed
25 to a rolling production of all of these phone calls.

1 And they stated on the record before Judge Gonzales
2 that they were getting these phone calls and would
3 produce them in a rolling fashion. So --

4 THE COURT: Wasn't that done for a while?

5 MS. SIRIGNANO: Not really, Your Honor, not
6 the jail calls of the cooperating defendants and of
7 some of the clients here. There were calls that were
8 produced, yes, of -- evidentiary in nature. But
9 we're talking 16,000 hours of phone calls, which we
10 requested in the very beginning of this case, that
11 was dumped on us in December of this year. So my
12 position would be that they be excluded one hundred
13 percent, and that they're not allowed in for
14 impeachment or rebuttal.

15 Because, quite frankly, I don't know if
16 they've actually even made a search for Brady or
17 Giglio in any of these phone calls. And we're trying
18 to go through as best as possible to find material
19 that would be good for us. But it's an impossible
20 task. We got 10,000 pages of discovery in PDF form
21 within that week. And now, we're going to have, on
22 the 15th, our Jencks deadline.

23 So all I'm saying is that my position would
24 be that they don't come in at all, Your Honor.

25 THE COURT: Well, let me do this: It may

1 never be a problem, so I'm not going to exclude them
2 at the present time. If it comes up that all of a
3 sudden they're a gold mine -- it sounds like they're
4 marginal and nobody right at the moment knows if
5 there is anything in there that, A, is admissible, or
6 useful to them. So I'm not inclined to start
7 excluding that much material, if we even don't know
8 if anybody's going to have anything in there they're
9 going to use. At the present time, the Government is
10 saying they don't think there is anything they're
11 going to use.

12 And you can renew it at the time that we
13 identify somebody is about to use this stuff. But
14 I'm inclined to leave it with -- if it's not on the
15 exhibit list on Friday, then it's not going to be in
16 the Government's case-in-chief.

17 Mr. Lowry?

18 MR. LOWRY: Yes, Your Honor.

19 Your Honor, with regard to the jailhouse
20 calls, I just wanted to alert the Court -- I mean,
21 I'm cognizant of the comments the Court has just now
22 made. But, unfortunately, we just started getting to
23 the tip of the iceberg of these jailhouse phone
24 calls. There are useful things. I mean --

25 THE COURT: To you?

1 MR. LOWRY: To Mr. Villa, frankly. We just
2 came across -- we took a stab at looking at Billy
3 Cordova's calls, for instance. And there is a number
4 of calls that would give them the perfect motion on
5 terms of coercion that we're arguing today, where Mr.
6 Cordova is telling his wife exactly the pressure that
7 was put on him, the threats that were made to his
8 family, that they would be prosecuted if he didn't
9 cooperate. And so he's explaining to his wife
10 exactly why he cooperated. And we're in the middle
11 of providing Mr. Villa those materials right now, so
12 he can prepare a motion to suppress.

13 Now, I realize the timing of this, you
14 know, lacks a little bit to be desired. But we just
15 got the phone calls. And this information is just
16 becoming available. And frankly, I think the impact
17 of that kind of testimony, again, it's like finding a
18 needle in a haystack. So I'll leave it to Mr. Villa
19 how he wants to approach that.

20 But to think that the phone calls are just
21 a lark would be mistaken.

22 THE COURT: Okay. Well, I don't think Ms.
23 Sirignano was saying that y'all couldn't use the
24 phone calls, right? You were saying, just keep the
25 Government from using them, correct?

1 MS. SIRIGNANO: Yes, if they're useful for
2 the defense, we should be able to use them, because
3 we've been asking for them.

4 And Judge, you know, I do have a little bit
5 of difficulty with the decision like there is nothing
6 very useful in there. We don't know one way or the
7 other. And we've got a staff of people listening to
8 them just to ascertain what is there.

9 Frankly, it's a timing issue, Judge. And
10 that's why I filed the notice, to alert the Court
11 that we've got all of this that's still out there.
12 And I'm sure this Jencks production is going to be
13 fairly substantial as well.

14 THE COURT: Well, maybe I'll limit my
15 remarks there doesn't appear to be anything useful to
16 the Government in it. Sounds like y'all are
17 beginning to find some stuff that may be useful for
18 defendants. And I'll modify my statement there. But
19 I wasn't aware that anybody had found anything yet.
20 I'll modify it there.

21 MS. SIRIGNANO: Thank you, Judge.

22 THE COURT: All right. Ms. Duncan.

23 MS. DUNCAN: Sorry, Your Honor. I wanted
24 to clarify something on the record about Grace Duran.
25 Grace, Ms. Duran, was served with two subpoenas

1 today; one is for trial, and one was actually for
2 purposes of this hearing. I think that she was
3 served at 11:00 this morning, is my understanding, so
4 we don't expect her to be here today. But we may
5 intend to call her later this week. So I know Mr.
6 Del Valle had talked about the trial subpoena. But I
7 just want it on record that she's under subpoena for
8 this week as well.

9 THE COURT: All right. Anything else?

10 All right. Ms. Armijo, does the Government
11 have its next witness or evidence on Mr. Baca's two
12 motions?

13 MS. ARMIJO: Yes. Sergio Sapien.

14 MR. DEL VALLE: Your Honor, if I may, may
15 we excused?

16 THE COURT: Any objection to Mr. Del Valle
17 and Mr. Duran being excused? All right. You're
18 excused. Thank you. Appreciate it.

19 MR. DEL VALLE: Are we back tomorrow?

20 THE COURT: When do you expect -- anybody
21 else need Mr. Del Valle in his capacity representing
22 Mr. Duran? All right. You're excused.

23 MR. DEL VALLE: Thank you, Your Honor.

24 THE COURT: You don't need to be here
25 tomorrow.

1 All right. Mr. Sapien, if you'll come up
2 and stand next to the witness box on my right, your
3 left. Before you're seated, my courtroom deputy, Ms.
4 Standridge, will swear you in.

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1 SERGIO SAPIEN,
2 after having been first duly sworn under oath,
3 was questioned and testified as follows:

4 DIRECT EXAMINATION

5 THE CLERK: Please be seated and state and
6 spell your name for the record.

7 THE WITNESS: Sergio Sapien. S-E-R-G-I-O,
8 S-A-P-I-E- N.

9 THE COURT: Mr. Sapien. Ms. Armijo.

10 MS. ARMIJO: Thank you, Your Honor.

11 For the record, I'm going to move for the
12 admission of Government's Exhibit 2, which is the
13 interview that you have now two transcripts of. But
14 it's the audio portion.

15 THE COURT: Any objection to Government's
16 Exhibit 2? Not hearing any, Government's Exhibit 2
17 will be admitted into evidence.

18 BY MS. ARMIJO:

19 Q. Mr. Sapien, where are you employed?

20 A. New Mexico Corrections Department, Security
21 Threat Intelligence Unit.

22 Q. All right. And what is your position
23 there?

24 A. Captain.

25 Q. And how long have you worked for

1 Corrections?

2 A. Almost 18 years.

3 Q. And how long have you been the Captain of
4 STIU?

5 A. Almost -- I want to say July, August of
6 2014.

7 Q. Now, are you familiar with Eric Duran?

8 A. Yes, ma'am.

9 Q. And how are you familiar with Eric Duran?

10 A. Just with my knowing him while he's been
11 incarcerated with the Department.

12 Q. And are you aware of --

13 THE COURT: Any other witnesses in this
14 hearing that are in the courtroom? Anybody want the
15 rule invoked for purposes of this motion? Anybody
16 else? Well, if nobody is concerned, plow ahead.

17 Ms. Armijo.

18 MS. ARMIJO: Thank you.

19 Q. And is he a member of a prison gang?

20 A. Yes, ma'am.

21 Q. Which prison gang?

22 A. SNM, Sindicato de Nuevo Mexico.

23 Q. At some point were you made aware of
24 whether or not he wanted to cooperate with law
25 enforcement?

1 A. Yes, ma'am.

2 Q. Can you tell us about that?

3 A. Yes, ma'am. At one time I was advised by
4 my boss that this inmate wanted to talk to me. So we
5 went back and pulled him out. And at that time he
6 advised me that he wanted to cooperate fully.

7 Q. Okay. When you say "he," who are you
8 referring to?

9 A. I'm sorry, Eric Duran.

10 Q. And who was your boss that informed you of
11 that?

12 A. Adam Vigil.

13 Q. And was there anything -- had Adam Vigil
14 had contact with Mr. Duran?

15 A. Yes, ma'am.

16 Q. And is that unusual that he would have had
17 contact with Mr. Duran?

18 A. That's not unusual.

19 Q. And so, based upon what Mr. Vigil told you,
20 what did you do?

21 A. We went back to the unit and had Eric Duran
22 pulled from his cell out into an office, and
23 interviewed him.

24 Q. And who is "we"?

25 A. Myself and Chris Cupit.

1 Q. And who is Chris Cupit?

2 A. He's one of my investigators, STIU.

3 Q. Now, do you recall approximately when this
4 was?

5 A. I want to say late November, early
6 December, somewhere around that time, 2014.

7 Q. All right. And when you spoke to him, did
8 he indicate anything to you about writing a letter to
9 you?

10 A. Not that I can recall. Writing a letter to
11 me? In reference to? I'm sorry, like --

12 Q. To, like, his cooperation or wanting to
13 cooperate?

14 A. I cannot recall that, ma'am.

15 Q. Now, what did he say to you as far as
16 cooperation?

17 A. On the basis of -- he was tired of dealing
18 with the gang and being in the gang. And that they
19 were about to do something big; that they wanted to
20 hurt or kill or assault Mr. Marcantel and
21 Mr. Santistevan.

22 Q. And who was Mr. Marcantel?

23 A. At the time he was Secretary of
24 Corrections.

25 Q. And Mr. Santistevan?

1 A. He was the head of STIU.

2 Q. And so what did you do with that
3 information?

4 A. I went back and advised my boss, Mr. Vigil.
5 And in turn, he started contacting -- you know, of
6 course, it went up the chain on our side. And then
7 he contacted the FBI.

8 Q. Did you change anything as far as
9 Mr. Duran, as far as move him or anything else, or
10 did you leave him in place so nobody would know there
11 was anything suspicious about your meeting with him?

12 A. We left him in place.

13 Q. And, at some point in time, were you made
14 aware that -- did he -- during his conversation with
15 you, did you use any threats against him to get him
16 to cooperate?

17 A. No, ma'am.

18 Q. Any coercion?

19 A. No, ma'am.

20 Q. Did it appear that he was doing so
21 voluntarily?

22 A. Yes, ma'am.

23 Q. And at some point, are you aware of him
24 actually meeting with the FBI?

25 A. Yes, ma'am.

1 Q. And do you recall when that was,
2 approximately?

3 A. I want to say February 19, I believe, 2015.

4 Q. Okay. So was that after your initial
5 meeting with him for his cooperation?

6 A. Yes, ma'am.

7 Q. And had anything -- when he was talking
8 with the FBI, were you part of that meeting as well?

9 A. Yes, ma'am.

10 Q. And at that time, was there anything, in
11 your view, as far as did you use any threats against
12 him?

13 A. No, ma'am.

14 Q. Any coercion against him to have him talk
15 to the FBI?

16 A. Sure didn't.

17 Q. Did it appear to you that he was talking to
18 the FBI on his own volition and free will?

19 A. Yes, ma'am.

20 MS. ARMIJO: If I may just have a moment?

21 THE COURT: You may.

22 MS. ARMIJO: That's all I have, Your Honor.

23 Thank you.

24 THE COURT: Thank you, Ms. Armijo.

25 Ms. Duncan, Mr. Lowry, do you have

1 cross-examination of Mr. Sapien?

2 MS. DUNCAN: If I may just have a moment,
3 Your Honor?

4 THE COURT: Certainly.

5 EXAMINATION

6 BY MS. DUNCAN:

7 Q. Good afternoon.

8 A. Good afternoon.

9 Q. When you met with Mr. Duran, did you
10 document that meeting?

11 A. The initial one?

12 Q. Yes.

13 A. I do not recall if I did or didn't, ma'am.

14 Q. Is it your practice to document meetings
15 with informants?

16 A. Yes, ma'am.

17 Q. How would you have documented, if you did?

18 A. Just simply noted the date and time. At
19 the time, I probably wouldn't have given him a CI
20 number just yet. I'm sure of the CI numbers, just
21 for the fact that you have to corroborate the
22 information and all that stuff prior to giving them.
23 So I would have documented, yes, ma'am, just with his
24 name.

25 Q. And I think you said Mr. Cupit was with

1 you?

2 A. Yes, ma'am.

3 Q. And would Mr. Cupit have documented it?

4 A. I would have probably been the one to
5 document that.

6 Q. And how do you document those kinds of
7 meetings?

8 A. We'll just go out and pull up a standard
9 STIU memo form, and just document date and time,
10 names, stuff like that.

11 Q. Do you summarize what you discussed with
12 the person in those reports?

13 A. Yes, ma'am.

14 Q. And you were talking about a CI number.
15 Can you tell the Court, what is a CI number?

16 A. That is a number that we give a
17 confidential informant.

18 Q. And at what point do you give a
19 confidential informant --

20 A. At the point that they met four of the
21 eight criteria, as per the policy.

22 Q. What does that mean?

23 A. There is eight criteria for documenting a
24 confidential informant. In order to validate their
25 information, they have to meet four of the eight.

1 Simple stuff.

2 Q. And did you give Mr. Duran a CI number?

3 A. Eventually, yes, ma'am.

4 Q. You say "eventually," do you know about how
5 long it took for you to give him a CI number?

6 A. Once we gathered the information from him
7 and corroborated some of it, I would give him a CI
8 number.

9 Q. And how would you document that process?

10 A. How would I document it? Date, facility,
11 my initials. I'd give him also a number.

12 Q. And would the report, where you say: Here
13 are the criteria I think that the CI has met, and
14 here's why?

15 A. Usually, yes, ma'am.

16 Q. And where would you keep those kinds of
17 documents?

18 A. I would type it all up. And if it was
19 something that needed to be submitted, I'd submit it
20 right away. Unless we're looking at some kind of
21 investigation.

22 Q. So how soon after your first meeting with
23 Mr. Duran did you meet with him again?

24 A. You know what, I don't recall. I'm sorry.

25 Q. Would you record -- did you record that

1 first meeting?

2 A. No, ma'am.

3 Q. Do you recall how soon after that meeting
4 that you would have met with Mr. Duran and the FBI?

5 A. It was approximately, maybe two months
6 later, a month-and-a-half, two months. We're talking
7 late November, December, up into the beginning of
8 February.

9 Q. When you say you met with him in late
10 November, early December -- is that what you said?

11 A. Yes, ma'am.

12 Q. So how do you recall when you met with him?

13 A. As I stated previously, I don't remember
14 where I was. I was away from the facility at the
15 time. And, you know, my boss -- they'd been doing
16 some shakedowns and interviews of that area, at which
17 time, he advised Mr. Vigil that he needed to talk to
18 me, and only me. So once I got back from where it
19 was -- I don't recall -- we had him pulled again.

20 Q. Do you recall there being a shakedown in
21 February of 2015?

22 A. Yes, ma'am.

23 Q. And during that shakedown that Mr. Duran
24 was found in possession of a shank?

25 A. That is on -- I believe he got a misconduct

1 for that, yes, ma'am.

2 Q. I'm sorry?

3 A. A misconduct report was submitted for that,
4 yes.

5 Q. And is it possible that Mr. Duran asked to
6 speak to you at the time of that shakedown, in
7 February of 2015?

8 A. He was kind of always talking -- asking to
9 talk to me. So more than likely.

10 Q. And you participated in the FBI's interview
11 with Mr. Duran in February of 2015; correct?

12 A. Yes, ma'am.

13 Q. And do you recall, during that meeting,
14 discussing a letter that Mr. Duran had written to
15 you?

16 A. I believe he made reference to a letter
17 that he had in his property that he had written. We
18 didn't retrieve that.

19 Q. So did you ever receive a letter from
20 Mr. Duran?

21 A. Yes, ma'am.

22 Q. You did. Tell me about that letter.

23 A. I received a bunch of letters from him.

24 Q. And where do you keep those letters?

25 A. They were signed in. I have them all, and

1 they were submitted with everything else we had.

2 Q. And when you say "they were submitted with
3 everything else" you had to --

4 A. All our SNM documentation that we had, that
5 we were to submit.

6 Q. And who did you submit it to?

7 A. I believe to Ms. Armijo.

8 Q. Do you have any SNM-related documents in
9 your possession that you did not submit to Ms.
10 Armijo?

11 A. No, ma'am.

12 Q. When you talked to Mr. Duran in that
13 initial meeting, what did he tell you he wanted to
14 do?

15 A. He advised that he was finished with the
16 gang life, and he wanted to provide information on
17 possible hits that they were looking at on a couple
18 higher up within the Department. And he just wanted
19 to be done.

20 Q. And at any point was Mr. Duran going to
21 enter the RPP Program?

22 A. No, ma'am.

23 Q. Did you ever discuss that with him?

24 A. We did. We discussed it with everybody. I
25 mean, anytime we do any interviews of any gang member

1 we always offer RPP, whether they want it or not.

2 Q. And can you tell the Court, what is that
3 program?

4 A. Restoration into the Population Program.
5 It's essentially just for individuals that were part
6 of a gang and wanting to leave the gang life.

7 Q. Were you involved in the providing Mr.
8 Duran with a recording device?

9 A. Yes, ma'am.

10 Q. Tell us about your involvement in that
11 process.

12 A. I would receive the devices from the FBI,
13 and I would take them in the facility and give them
14 to Mr. Duran.

15 Q. How would you do that?

16 A. Different ways. I'd either -- you know,
17 initially, I had to show him, Hey, this is what this
18 is, and how you turn it on and turn it off, and
19 either during chow -- I'd help serve chow. I'd wait
20 till they were at recreation, nobody was in there,
21 and then deliver the device and pick up the other
22 one.

23 Q. So when you would deliver the new device
24 and pick up the old one, would you do that at the
25 same time?

1 A. Yes, ma'am.

2 Q. And did you always do that at the same
3 time?

4 A. Yes.

5 Q. How many times do you think you picked up
6 and delivered a recording device from Mr. Duran?

7 A. It was a few. I can't remember the exact
8 number.

9 Q. Do you remember the time period for which
10 you were doing that?

11 A. I want to say February, March of 2015,
12 maybe all the way up until December 2015.

13 Q. And were you also involved in providing him
14 with a cellphone?

15 A. Yes, ma'am.

16 Q. Tell us about that.

17 A. It was a preapproved deal, that they wanted
18 to introduce the cellphone for, you know, purposes of
19 investigation. It was approved on our level. And
20 that's way above my pay grade, central office
21 personnel. Once everything was approved, I took it
22 in to him.

23 Q. And were you involved in taking the
24 cellphone from Mr. Duran?

25 A. Yes, ma'am.

1 Q. Can you tell us about that?

2 A. I believe -- I don't remember if it was the
3 exact date of the actual takedown, if it was the
4 actual cellphone or a device. But when we went in
5 there that day, he actually just handed it to us
6 through the food port. We opened the food port and
7 he actually handed it to Mr. Cupit that day.

8 Q. He handed both the cellphone and the
9 recording device?

10 A. I don't remember exactly which one it was.
11 It might have been just one. I believe it was a
12 cellphone.

13 Q. And after you all got the cellphone from
14 Mr. Duran, what did you do with it?

15 A. We took it straight with us to the takedown
16 area, which is the Gold Office in Albuquerque, and
17 handed it over.

18 Q. Did you --

19 A. It might have been the recording device.
20 I'm sorry. It was one or the other.

21 Q. Okay. But were you involved, do you recall
22 being involved in taking the cellphone from
23 Mr. Duran?

24 A. Yes, ma'am.

25 Q. And when you took the cellphone from him,

1 did you examine it?

2 A. No, ma'am.

3 Q. Did you turn it on?

4 A. I turned it off, if it wasn't already off.
5 Usually, it was always off.

6 Q. And did you delete anything from that
7 cellphone?

8 A. No, ma'am.

9 Q. No pictures or texts?

10 A. No, ma'am.

11 Q. Did you ever, at any point, delete anything
12 off of that cellphone?

13 A. No, ma'am.

14 Q. So, from the time that you gave Mr. Duran
15 the cellphone initially, and then you retrieved it
16 from him sometime in December of 2015, did you touch
17 it anytime in between?

18 A. Did I touch it?

19 Q. Yes.

20 A. No, ma'am.

21 Q. And when you would retrieve the recording
22 devices from Mr. Duran, the ELSUR devices, what would
23 you do with them?

24 A. I would take them to the FBI and give them
25 to them.

1 Q. Was there a particular person who you took
2 them to?

3 A. Mr. Acee.

4 Q. You mentioned that when you first gave
5 Mr. Duran the recording device, you gave him
6 instructions on how to use it. Do you recall exactly
7 what you told Mr. Duran?

8 A. The recording device, I believe it's just
9 basic on and off. It's a little box.

10 Q. Did you talk to him about the battery life
11 of the device?

12 A. Just kind of -- I really don't know how to
13 work them, you know. There is batteries on them.
14 You turn them on, turn them off. Typically, after
15 there was -- I guess there was time where the
16 batteries kind of failed. We'd get new batteries.
17 And I wouldn't even put them in the device. I would
18 tape them to the side and then deliver them to Mr.
19 Duran.

20 MS. ARMIJO: Your Honor, and if I can -- I
21 don't believe this witness knows that. And I would
22 ask that he not describe the device in court, and
23 just talk only about the battery life and the on and
24 off switch, and not describe any recording device
25 specifically.

1 THE COURT: Let Ms. Duncan specifically ask
2 you questions about these devices. I've entered some
3 orders that limit what can be disclosed on it.

4 THE WITNESS: Okay.

5 THE COURT: So you're welcome to answer her
6 questions. Ms. Armijo can object, but just be
7 careful here about the description, particularly
8 about the port. And so keep away from that, but
9 otherwise, you can go ahead and answer Ms. Duncan's
10 questions.

11 Q. I'm not going to ask you what it looks
12 like. I just want to understand how it operated and
13 how you got it to Mr. Duran. So you said you taped
14 some batteries to the side. The side of what?

15 A. The side of the device.

16 Q. So it was your understanding that the
17 device had batteries, but then you would give Mr.
18 Duran a spare set?

19 A. If there was. If not, he'd have an extra
20 one.

21 Q. When you spoke with Mr. Duran about
22 cooperating with the STIU, did you also talk to him
23 about benefits he would receive?

24 A. No, ma'am.

25 Q. For example, did Mr. Duran ask you about

1 getting lump sum credit on his sentence for
2 cooperating?

3 A. Not initially, ma'am.

4 Q. Did he talk to you about getting some of
5 his commissary back, his privileges back, in exchange
6 for cooperating?

7 A. I don't recall. I'm sorry.

8 Q. And you said that he didn't talk to you
9 about the lump sum initially. At what point did he
10 talk to you about that?

11 A. He it brought it up. I don't remember the
12 exact date, but he brought it up.

13 Q. Did he talk to you about good time that he
14 had forfeited for earlier disciplinary issues?

15 A. Yes, ma'am.

16 Q. And did he ask you about giving him back
17 his good time?

18 A. Yes, ma'am.

19 Q. You were involved in the investigation of
20 Mr. Duran for possessing a contraband cellphone in
21 the past; correct?

22 A. Yes, ma'am, I do recall that.

23 Q. And can you tell us about that incident?

24 A. I don't remember the exact date. I know
25 that he was caught with one while housed at the North

1 facility.

2 Q. Do you know how he got that cellphone into
3 the North?

4 A. I don't, ma'am.

5 Q. And I think you said you can't recall how
6 often you exchanged out the device; is that correct?

7 A. Yes.

8 Q. Did anyone other than you handle the
9 recording devices?

10 A. Other than Cupit, I have no idea, no,
11 ma'am, not that I recall.

12 Q. Who was in charge of coordinating the
13 changing out of the recording devices?

14 A. Usually, I would just do it myself.

15 Q. And how would you know that it was time to
16 change out the device?

17 A. Mr. Duran would contact me, or we'd --
18 whenever I got a new one, I'd switch them out.

19 Q. And how would he contact you?

20 A. He would call me.

21 Q. Using what phone?

22 A. The state phone, the inmate cellphone. I'm
23 sorry, inmate Securus phone. I apologize.

24 Q. Okay. So is that the phone that all
25 inmates use to call their families?

1 A. Yes, ma'am.

2 Q. Is that also known as "the house phone"?

3 A. Never heard that.

4 Q. Did Mr. Duran call you using any phone
5 other than the state-issued phone?

6 A. Not that I can recall.

7 Q. Did you ever facilitate phone calls between
8 Mr. Duran and Mr. Acee?

9 A. Yes.

10 Q. And tell us about that. How did you
11 facilitate those phone calls?

12 A. He'd call me, and I would do like a group
13 call, I guess you would call it.

14 Q. So Mr. Duran would call you on the prison
15 phone, and you'd call Mr. Acee and you'd conference
16 it in?

17 A. Correct.

18 Q. So the calls that Mr. Duran would make to
19 you on the prison phone, were those recorded?

20 A. No, ma'am.

21 Q. And why not?

22 A. It's a deal we have with Securus.

23 Q. How does Securus know which phones should
24 be recorded, and which aren't?

25 A. With my phone number, my state-issued

1 cellphone number.

2 Q. Is it just the calls to your state-issued
3 phone number that aren't recorded or other calls not
4 recorded?

5 A. Just to mine, I believe.

6 Q. So as an attorney, if I had a client who
7 was in PNM North, could I give Securus my phone
8 number and they wouldn't record it?

9 A. No, ma'am.

10 Q. Other than these conference calls that
11 you've discussed, did you ever -- is there any other
12 way that you would facilitate communication between
13 Mr. Acee and Mr. Duran?

14 A. None that I can recall.

15 Q. Now, the STIU monitors inmate phone calls;
16 correct?

17 A. Yes, ma'am.

18 Q. Not the ones, obviously, you're making with
19 Mr. Duran, but the ones he has with his family?

20 A. Yes.

21 Q. And it's part of the regular duties of STIU
22 to monitor phone calls of suspected SNM; correct?

23 A. We monitor phone calls of all inmates.

24 Q. And did you monitor Mr. Duran's phone calls
25 while he was working as an informant for STIU?

1 A. Yes, ma'am.

2 Q. And how about after the takedown in
3 December of 2015?

4 A. I believe so.

5 Q. And were any reports written of monitoring
6 his phone calls?

7 A. No, ma'am.

8 MS. DUNCAN: If I could just have a moment,
9 Your Honor?

10 THE COURT: You may.

11 Q. Did you meet with Mr. Duran before going
12 with him to meet with the FBI?

13 A. I'm sorry. Can you --

14 Q. Yeah, it was a bad question. I apologize.

15 So were you involved in arranging the
16 meeting with the FBI?

17 A. Yes, ma'am.

18 Q. Did you meet with Mr. Duran to prepare him
19 for that meeting?

20 A. I'm sure I advised him.

21 Q. And what did you advise him?

22 A. That he would be going, at his request, to
23 speak with the FBI.

24 Q. And did you talk to him about what would be
25 discussed during the FBI meeting?

1 A. No, ma'am.

2 Q. And when you met with the FBI, did you
3 prepare any documents for them?

4 A. I don't recall taking anything with me, not
5 that time.

6 Q. So the time that you met with Mr. Duran and
7 the FBI, you didn't?

8 A. Initially, no, ma'am.

9 Q. But then later in the investigation, you
10 did provide documents; is that correct?

11 A. Yes.

12 Q. Were you present during any other
13 interviews between Mr. Duran and the FBI?

14 A. Yes, ma'am.

15 Q. And when were those interviews?

16 A. I don't recall. I'm sorry. It's been a
17 little bit, and there are so many.

18 Q. Sure. So do you know -- for example, have
19 you been involved in any interviews with Mr. Duran
20 since the takedown in December 2015?

21 MS. ARMIJO: Objection, relevance.

22 THE COURT: What's the relevance to the two
23 motions?

24 MS. DUNCAN: I think the relevance would
25 be, Your Honor, that -- our argument is that

1 Mr. Duran's ongoing participating in this case is
2 coerced. So knowing the scope of his participation
3 is relevant to understanding that coercion.

4 THE COURT: Let me see what his answer is,
5 then I'll determine whether I'm going to allow any
6 more testimony.

7 A. Will you repeat the question?

8 Q. Of course. Were you involved in any
9 meetings between Mr. Duran and the FBI after the
10 takedown in December of 2015?

11 A. Yes, ma'am.

12 Q. And when was that?

13 A. I don't recall. There were a few -- we had
14 him housed in state custody. So --

15 Q. So would you participate in the meetings
16 between Mr. Duran and the FBI -- every meeting while
17 he was in state custody?

18 A. I wouldn't say every meeting, but I'm
19 usually around, yes, ma'am.

20 Q. Was anyone else from STIU participating in
21 those meetings?

22 A. Yes, ma'am.

23 Q. Who?

24 A. It depends on the day, and days off, and
25 who is around.

1 Q. So did everyone in the STIU know that
2 Mr. Duran was an informant?

3 A. Within my crew, yes, ma'am.

4 Q. And who is part of your crew?

5 A. I'm sorry -- in my crew -- my unit. I
6 apologize. Chris Cupit; Ramil Loya at the time;
7 sergeant Ron Martin; Adam Vigil.

8 MS. DUNCAN: Your Honor, if I could just
9 have a moment?

10 THE COURT: You may.

11 MS. DUNCAN: I have no further questions.

12 THE COURT: Thank you, Ms. Duncan.

13 Any other defendants have
14 cross-examination? Ms. Sirignano.

15 MS. SIRIGNANO: Quick question.

16 EXAMINATION

17 BY MS. SIRIGNANO:

18 Q. Good afternoon.

19 A. Good afternoon.

20 Q. You said that you participated in meetings
21 with the FBI and Mr. Duran; correct?

22 A. Yes, ma'am.

23 Q. Can you give me a ballpark number of how
24 many meetings you think you attended?

25 A. Are we talking meetings, or just --

1 Q. Well, why don't you break it up and just
2 give me an idea of --

3 A. Are you talking about, like, actual
4 meetings?

5 Q. Yes.

6 A. Or are we talking about just regular
7 interaction?

8 Q. With the FBI and Mr. Duran?

9 A. You mean individually, by himself?

10 Q. Yes, let's start with that.

11 A. I couldn't recall all of them, ma'am. I'm
12 sure there was plenty.

13 Q. "Plenty" meaning more than 20?

14 A. I have no idea. I couldn't answer that.

15 Q. So between -- you can't give me just a
16 ballpark. I mean, I'm not looking for -- to nail you
17 in on something. But was it once a month? Was it
18 more than once a month?

19 A. Well, I mean, there is -- actual meetings
20 where he was pulled out?

21 Q. Yes.

22 A. By himself?

23 Q. Yes.

24 A. After 2015?

25 Q. Yes. No, no, while he had the cellphone

1 and the recording device. Let's start with those
2 first.

3 A. I don't have anything in front of me. I
4 mean, there was bunch of times that we talked to him,
5 yes, ma'am. But I couldn't recall every single time.

6 Q. So could you just give me a ballpark what a
7 "bunch" means to you?

8 A. I'm sorry, I couldn't. We were in pretty
9 much constant contact, so --

10 Q. With the FBI?

11 A. Yes, ma'am.

12 Q. So, actually transporting him down to the
13 FBI building, can you give me an idea of how many
14 times that might have happened?

15 A. I know it happened initially the first
16 time. I'm drawing a blank on the rest of them, I'm
17 sorry. I don't have anything in front of me to refer
18 to, so --

19 Q. Did it increase or decrease after the
20 arrests in December of 2015?

21 A. I would say decreased.

22 Q. And who would attend those meetings
23 generally?

24 A. The FBI and us.

25 Q. Who with the FBI?

1 A. Mr. Acee.

2 Q. Anyone else?

3 A. Like I said, I can't recall. We've done so
4 many. And I don't have it in front of me, I can't
5 reference it, and I don't want to guess.

6 Q. And when you said "and us," meaning the
7 STIU Unit?

8 A. Yes.

9 Q. And who would go with you, generally?

10 A. Usually, they need -- well, any of my guys
11 that are available, between scheduled days off, and
12 vacations, and stuff like that. It's who I have
13 around.

14 Q. And prior to 2015, was Mr. Duran working
15 with anyone else other than the FBI in law
16 enforcement?

17 A. Just I'm aware of 2014, is when I initially
18 talked to him.

19 Q. And that was it?

20 A. That I'm aware of yes, ma'am.

21 MS. SIRIGNANO: Thank you. Pass the
22 witness.

23 THE COURT: Any other defendant have
24 questions of Mr. Sapien? Mr. Villa?

25 MR. VILLA: Thank you, Judge.

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EXAMINATION

BY MR. VILLA:

Q. Good afternoon, Mr. Sapien.

Were you aware of who Mr. Duran was recording at the time you were providing these recording devices?

A. Yes, sir.

Q. Who do you know that he recorded?

A. I know he recorded Mr. Baca, Anthony Ray Baca. I believe -- I'm sorry, I'm having one of those days. Mario Rodriguez was in on some of those recordings.

Q. What was the first name?

A. Mario.

Q. Who also goes by "Blue"?

A. Yes, sir.

Q. What about Timothy Martinez?

A. I don't recall, sir. I don't recall. I was trying to think about --

Q. Billy Cordova?

A. No, sir.

Q. Rudy Perez?

A. Not that I recall.

Q. Did you listen to these recordings?

A. Yes, sir -- not all of them.

1 Q. But you listened to recordings, for
2 instance, of Mario Rodriguez?

3 A. Yes, sir.

4 Q. And I apologize, I think you said you
5 weren't sure about Timothy Martinez?

6 A. Yes, sir.

7 MR. VILLA: May I have just a moment, Your
8 Honor?

9 THE COURT: You may.

10 MR. VILLA: That's all the questions I
11 have.

12 THE COURT: Thank you, Mr. Villa.

13 Any other defendants have questions of Mr.
14 Sapien?

15 All right. Ms. Armijo, do you have
16 redirect of Mr. Sapien?

17 REDIRECT EXAMINATION

18 BY MS. ARMIJO:

19 Q. You spoke a little bit about how Mr. Duran
20 initiated good time and lump sum credit or lump sum
21 amount and some good time credit?

22 A. Yes.

23 Q. And when was that? Do you recall?

24 A. I want to say early 2015 sometime, March,
25 April.

1 Q. Sometime after the initial meeting?

2 A. Yes, ma'am.

3 Q. And did you make him any promises as to
4 that?

5 A. No, ma'am. I did advise him I'm not the
6 classification worker. And that type of math, and
7 dealing with that, I have no dealing with.

8 Q. All right. So was his cooperation in any
9 way conditioned upon any promises that you made to
10 him?

11 A. No, ma'am.

12 Q. And who was primarily in charge of the
13 recordings? Was it your agency or was it FBI?

14 A. FBI.

15 MS. ARMIJO: I have nothing further. Thank
16 you.

17 THE COURT: Thank you, Ms. Armijo.

18 All right. Mr. Sapien, you may step down.
19 Is there any reason that Mr. Sapien cannot be excused
20 from the proceedings? Ms. Armijo?

21 MS. ARMIJO: No, Your Honor.

22 THE COURT: How about any of the other
23 defendants? Can he be excused? Not hearing any
24 objections, Mr. Sapien, you're excused from the
25 proceedings. Thank you for your testimony.

1 MS. ARMIJO: Your Honor, he is one of our
2 expert witnesses, and since he's excused from -- we
3 didn't have him in earlier because of the hearing,
4 and he was going to be testifying. Is there any
5 objection to him sitting in now?

6 THE COURT: I don't guess I see any
7 problem. Anybody else have any problem? All right.
8 Not hearing any --

9 MR. CASTLE: Judge, I do. I think the last
10 time we heard from one of their proposed expert
11 witnesses, it turned out that it was also a
12 percipient witness. Too many things. So I don't
13 think that we should, when they're these hybrid kinds
14 of witnesses, I don't think we should use the expert
15 witness exception to the rule.

16 THE COURT: I tend to agree. If they're
17 going to be both a fact witness and an expert
18 witness, if they're sitting in, I'm inclined to agree
19 with it. So you're excused from this proceeding.
20 But you can't sit in on the testimony because you are
21 a fact witness in this case.

22 THE WITNESS: Yes, sir.

23 THE COURT: All right. Ms. Armijo, does
24 the Government have its next witness or evidence on
25 these two motions?

1 MS. ARMIJO: May I have a moment?

2 THE COURT: Certainly.

3 MS. ARMIJO: That's all we have, Your
4 Honor.

5 THE COURT: Thank you, Ms. Armijo.

6 Ms. Duncan? Mr. Lowry? Does Mr. Baca have
7 any witnesses or evidence he wishes to present?

8 MR. LOWRY: Yes, Your Honor. We have
9 Edward Urtiaga out in the hall.

10 THE COURT: All right.

11 MS. ARMIJO: Your Honor, before that
12 witness is brought in, can we approach on this issue?

13 MR. LOWRY: Sure.

14 (The following proceedings were held at the
15 bench.)

16 THE COURT: What this is witness' name?
17 Edward what?

18 MR. LOWRY: Edward Urtiaga, U-R-T-I-A-G-A.

19 MS. ARMIJO: And, Your Honor, my
20 understanding is that they were going to call him
21 tomorrow. I was surprised they're calling him today.
22 Mr. Urtiaga has Giglio we would be probably using to
23 show a bias. He's on administrative leave. My
24 understanding is New Mexico State Police is
25 investigating him for an incident that occurred.

1 THE COURT: What is, or what was his
2 position?

3 THE CLERK: Judge, if --

4 MS. ARMIJO: At the time, or now? We know
5 he had been removed from STIU, and he was a
6 correctional officer.

7 THE COURT: Okay.

8 MS. ARMIJO: So I think that they would --
9 possibly to show bias. We would have a right to
10 question him about it. But we would be advised that
11 he has a Fifth Amendment right as to that. But I
12 haven't had a chance to call the New Mexico State
13 Police on it. But if I had known that, I would have
14 called him over lunch. I have to call State Police
15 to ask him about the status of the investigation.

16 THE COURT: I'm sorry I'm being so slow on
17 this, but you're calling an STIU officer to the stand
18 that's going to testify generally about what?

19 MR. LOWRY: He was going to testify about
20 the February 18 threats made to his life.

21 THE COURT: Oh, that's right.

22 MR. LOWRY: And I don't disagree with what
23 Ms. Armijo said.

24 THE COURT: So you're trying to establish
25 that?

1 MR. LOWRY: That precipitated the meeting.
2 And I realize where we are in the process.

3 THE COURT: So what are you concerned about
4 him testifying? What do you need?

5 MS. ARMIJO: Well, I would be concerned
6 that -- I don't know. I haven't spoken to him. I
7 don't know what he's going to say as far as anything
8 else, or the extent of it.

9 THE COURT: The extent of what?

10 MS. ARMIJO: The extent of his testimony.
11 I do know that there were other inmates present other
12 than Mr. Duran. And I know that Mr. Duran has read
13 the reports and disagrees with what was written on
14 the reports. I mean, I don't think there is any
15 dispute that Mr. Duran was disciplined for it. And I
16 think the Court will consider those records. But I
17 just think it can get very messy with this witness.
18 And the fact that -- and my concerns are an open
19 investigation on him. It's for excessive force on an
20 inmate.

21 MR. CASTELLANO: So the issue, Your Honor,
22 is that he may be impeached related to that
23 investigation and any bias he has against the
24 Corrections Department now in his testimony before
25 the Court. So there is potential impeachment against

1 him. But at the same time, we're going to run
2 against his Fifth Amendment privilege by doing so.
3 So that's where it gets a little tricky, is they're
4 going to impeach him potentially on his bias, then
5 that includes when he's on leave now and facing
6 criminal investigation.

7 THE COURT: Does he have an attorney on
8 those issues?

9 MS. ARMIJO: We haven't discussed it with
10 him.

11 MS. DUNCAN: Your Honor, we didn't mean to
12 surprise you. We just ran faster. So we would agree
13 to put him first thing tomorrow, and go on to Agent
14 Acee.

15 MS. ARMIJO: We're still going to have the
16 issue tomorrow. The only thing that's different -- I
17 can make a call to the New Mexico State Police, and
18 they'll tell me: We completed our investigation, we
19 haven't completed it. At least I can give the status
20 update. But I think the issue will remain.

21 THE COURT: Do you think if you called the
22 State Police, and let's say you called the State
23 Police and they're done, they're not going to do
24 anything with him, you think your problems or
25 concerns are cleared up?

1 MS. ARMIJO: Maybe his Fifth Amendment
2 right may be cleared up to some extent. But I think
3 there is a good chance he's going to be fired by
4 Corrections regardless.

5 THE COURT: Be fired?

6 MS. ARMIJO: Yes.

7 MR. LOWRY: For testifying?

8 MS. ARMIJO: No, not for testifying.

9 MR. LOWRY: We want to make that clear on
10 the record.

11 MS. ARMIJO: No, for his actions that he's
12 under investigation for. My understanding is that it
13 was not a simple --

14 THE COURT: Well, I guess, you know,
15 somebody can correct me if I'm wrong, you know, that
16 may have some consequences for him from a civil
17 standpoint, personal standpoint. But it's not
18 criminal. So it sort of seems like it's not a
19 problem from a constitutional standpoint. And so I
20 don't have to worry about him having counsel. I
21 don't have to worry about him being prosecuted. He
22 may lose his job on it, but that happens almost every
23 case, somebody is going to suffer some personal
24 consequences. So I'm inclined to skip that one and
25 see if we can find out whether he's got some criminal

1 liability we need to be worried about.

2 MS. ARMIJO: That's fine. If they call
3 Special Agent Acee, I can step out and do that.

4 THE COURT: All right. Is that agreeable
5 to y'all?

6 MR. LOWRY: That's fine. We had called him
7 because we were concerned about running out of
8 witnesses, and that's exactly what happened. So we
9 can call Bryan Acee.

10 THE COURT: Okay. You can step out and
11 make your call. Let's go ahead and do Acee. And
12 we're going to take a break here in a little bit
13 anyway.

14 MS. ARMIJO: Okay.

15 (The following proceedings were held in
16 open court.)

17 THE COURT: All right. Mr. Acee, you're
18 being called, so if you'll come up and stand next to
19 the witness box. Before you're seated, Ms.
20 Standridge will swear you in.

21

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24

25

1 BRYAN ACEE,
2 after having been first duly sworn under oath,
3 was questioned and testified as follows:

4 DIRECT EXAMINATION

5 THE CLERK: Please be seated and state your
6 name for the record.

7 THE WITNESS: Bryan Acee.

8 THE COURT: Mr. Acee, Mr. Lowry.

9 BY MR. LOWRY:

10 Q. Agent Acee, when did you first come to meet
11 Eric Duran?

12 A. August 2015.

13 Q. And what precipitated your meeting with
14 Mr. Duran?

15 A. I'd been assigned to the investigation of
16 the SNM. Agent Brusuelas and Captain Sapien, that
17 you just heard from, notified me that they had an
18 informant within the S up at the North.

19 Q. And did you ask to speak with him, or how
20 did the meeting come about?

21 A. Yes, at some point I did, yes.

22 Q. Prior to that, who was Mr. Duran's handler?

23 A. Katherine Brusuelas.

24 Q. And was there a point in time when you took
25 over those duties?

1 A. Yes, sir. I think it would have been in
2 about August.

3 Q. As a matter of policy, how does that take
4 place within the FBI?

5 A. It's a simple switch, in terms of his Delta
6 file, or his informant file. We send an email, and
7 the office changes the handling agent.

8 Q. Do you review that file before you take
9 over handling that agent -- or that CI?

10 A. I can.

11 Q. I guess my question is, at that point in
12 time, when you took over handling Mr. Duran, was he
13 already in the process of recording folks in the
14 prison?

15 A. He was. There was some trouble with that.
16 But I believe they'd tried.

17 Q. What do you mean there was trouble with it?

18 A. When I met Duran, he claimed he had made
19 several recordings. And when I checked that, there
20 weren't any. So then I talked to Agent Brusuelas,
21 and she was under the impression as well that he did.
22 And it turns out that the device they were using,
23 which I'm familiar with, was smaller, and didn't
24 work. I think the batteries were dead.

25 Q. The entire time he had the device, or --

1 A. No. Because there was one recording on
2 there of Timothy Martinez, so that indicates to me --
3 because I wasn't handling Duran when he did that one.
4 So I think there was enough power on the device to
5 get that conversation, however long it lasted. Duran
6 claimed that he also had a really long conversation
7 with Mario Rodriguez. And that doesn't exist.

8 Q. And the first call was with Tim Martinez, I
9 believe you said?

10 A. Yes. Not a call, but a recording.

11 Q. A recording, an ELSUR recording?

12 A. Yes.

13 Q. Was that turned over in discovery?

14 A. Yes. As I understand it, a number of the
15 cooperators have told me -- they kind of tell me
16 where on the tablet it is. But I'm not sure exactly.

17 Q. Was that the same type of recording
18 device -- without going into specifics -- that was
19 used later, when you took over the duties of handling
20 Mr. Duran, or did you change makes, models?

21 A. It was not the same device. It was very
22 different.

23 Q. Now, did you talk to him about how to
24 handle the new device that you gave him?

25 A. Yes. Without going into great detail, the

1 original device was more complex. And I had tried it
2 in the prisons on another case as well. I didn't
3 like it. We were getting the device back and the
4 recordings weren't on there. So we dumbed it down to
5 this simple device we talked about a bunch in here,
6 with an on and off switch. So I think I had some
7 conversation with him about that.

8 Q. Now, is there a standard set of protocols
9 that you would go through to -- I'll use the word
10 train, but instruct, you know, school a confidential
11 informant on how to use the device?

12 A. No. Particularly not a simple one like
13 that.

14 Q. Would there be any protocols within the FBI
15 about, you know, making sure you get complete
16 recordings of conversations?

17 A. To answer your question, no. Is there a
18 protocol within the FBI? No.

19 Q. Would that be something you would be
20 concerned about, as an FBI agent handling a
21 confidential informant, to make sure you capture a
22 conversation from the beginning of it until the end
23 of it?

24 A. Yes and no.

25 Q. Why yes?

1 A. Well, if the informant tells me a
2 conversation happened, and it's not on there, then
3 they're going to have to do it over. They don't get
4 credit for it, or we don't use it in terms of asking
5 for prosecution.

6 Q. Why no?

7 A. Well, we're in the most secure facility in
8 the state in terms of a prison. And we had
9 significant challenges getting recording devices in
10 there, and significant failures attempting to do so
11 early on. So we also had failures with the devices
12 themselves in terms of the battery life. So I say no
13 because a new battery life was an issue. And I made
14 that known to the sources. So, in that case, if two
15 neighbors are talking endlessly for hours, they're
16 going to have to turn it off.

17 Q. Why not just wire the cells, you know,
18 independently so you didn't have to worry about
19 battery life or anything like that?

20 A. We thought of that. We considered that.
21 We considered using car battery type things. The
22 problem was we couldn't get techs into the
23 institution. All of the inmates are very watchful,
24 particularly the SNM. I've been in their pod a
25 number of times. And they know we're coming as soon

1 as we hit the gates.

2 Q. Was there a way to wire the cells so you
3 didn't have to come and go, so it could just be
4 independent?

5 A. I'm not a tech agent. But I did ask that.
6 That was my preference. And I think we went as far
7 as doing some site survey, the tech agents. And they
8 could not come up with a plan and not compromise
9 security, so no.

10 Q. So if I understand your answer -- and
11 correct me if I'm wrong -- this was the best
12 available solution you had to make recordings in this
13 particular unique environment?

14 A. Yes, sir.

15 Q. How often -- when you talked about battery
16 life, in your experience, how often did you have to
17 change out the batteries for any particular device?

18 A. That's a tough one. Because when we get it
19 back -- as you may recall from some of the other
20 hearings, I don't handle the device other than to
21 turn it in. So I don't know if an informant has used
22 it for a couple of weeks, and then I turn it in, I
23 don't know how much battery life is left. So it's
24 hard for me to say. But I would rely primarily on
25 the informants to tell me, Hey, I've got a lot of

1 conversation. And that was my indicator that we need
2 to probably switch the device.

3 Q. Now, Captain Sapien just spoke -- would you
4 nudge Sapien to switch out the device, or how would
5 he know to go in?

6 A. Actually, from my recollection, a number of
7 times he told me, because he had more communication
8 with the informants in the Level 6 than I did. He
9 had more awareness.

10 Q. Because he's there on a daily basis?

11 A. Correct.

12 Q. So is there any way for the individual
13 handling the device to know how much battery life is
14 left in it?

15 A. No. They're going to be estimating. But
16 they don't know. There is no readout or anything
17 like that.

18 MR. LOWRY: May I have a moment, Your
19 Honor?

20 THE COURT: You may.

21 Q. Is the only way an individual using the
22 device would know the battery is dead if the light
23 wouldn't come on when you tried to activate it?

24 A. That makes sense on that particular type of
25 device.

1 Q. How often did you review -- when you clawed
2 back a device, how eager were you to review the
3 audios that were on it?

4 A. I wasn't. I had newer agents doing that.

5 Q. I take it those newer agents would give you
6 feedback about what was there?

7 A. Yes, they wrote a summary. I think you had
8 me -- or perhaps, it may have been Mr. Castellano --
9 but I read through the bullet point summaries. They
10 would write those.

11 Q. Okay. And were you part of, I think, of
12 Joe Sainato's conversations with Mr. Duran about the
13 quality of the recordings?

14 A. No. That agent would report that he was
15 having a problem, and indicate that he was going to
16 communicate that to Duran. That's the extent I would
17 have been involved.

18 Q. Did anybody ever express any concern to you
19 that the way the recordings were being made -- and by
20 that -- let me withdraw that question, Your Honor.

21 Is it fair to say that sometimes you just
22 have snippets of conversations?

23 A. Yes.

24 Q. And is it fair to say, more often than not,
25 the recordings that we see on the ELSUR devices

1 really were just partial conversations?

2 A. Well, they're not complete. Some of them
3 are -- you know, they last several minutes. But
4 where they start and where they end might be cut off.

5 MR. LOWRY: Where did we leave off on
6 exhibit numbers?

7 THE COURT: I think on this hearing it's
8 Exhibit C, am I correct, Ms. Standridge, on this
9 hearing?

10 THE CLERK: I'm looking for it.

11 THE COURT: Use Exhibit C.

12 THE CLERK: I think so. D as in dog.

13 THE COURT: So it will be Exhibit D, Mr.
14 Lowry.

15 MR. LOWRY: Thank you, Your Honor. If I
16 may.

17 Q. So I'm just putting on the Elmo what I've
18 marked as Defendant's Exhibit D.

19 THE COURT: Do you have any objection to
20 this, Ms. Armijo?

21 MR. CASTELLANO: No objection, Your Honor.

22 THE COURT: Anybody else? You're moving
23 its admission?

24 MR. LOWRY: Yes, I am, Your Honor.

25 THE COURT: Defendant's Exhibits D will be

1 admitted into evidence. Mr. Baca's Exhibit D.

2 MR. LOWRY: If I could focus this.

3 Q. Do you see that? And Special Agent Acee,
4 this is what you're talking about some of the calls,
5 some of the snippets would be anywhere from
6 two-and-a-half minutes on this particular exhibit,
7 which is in three parts, of the 16-and-a-half
8 minutes, roughly?

9 A. Yes.

10 Q. And so nothing -- the length of the
11 recording would be completely dictated by this
12 objective point of view of Mr. Duran?

13 A. Well, it would be completely subjective to
14 the on and off switch.

15 Q. Well, the on and off switch didn't have any
16 ability to cut itself on or off, did it?

17 A. I don't think so.

18 Q. Okay. And so the person operating the
19 device would be Mr. Duran?

20 A. Yes, sir.

21 Q. And something in his mind had to trigger
22 him to cut the switch on?

23 A. Correct.

24 Q. And something triggered it to cut off.

25 A. Yes.

1 Q. And that would just be his independent
2 opinion about whether the conversation was worthy of
3 recording?

4 A. He was in total control of the device.

5 Q. And, again, I want to cycle back just to
6 make sure we're clear on the record. But there was
7 never any advice, instruction, encouragement, hey,
8 when you get up in the morning and you say, "Good
9 morning, Mr. Baca" -- cut it on then, see what you
10 get, and then cut it off?

11 A. No, I didn't give him any advice like that.

12 Q. So what advice did you give him in terms of
13 what you wanted to see on the recordings?

14 A. Well, in our first interaction in August,
15 after I met him, he told me that he had made several
16 recordings, which I couldn't find. So my advice to
17 him was to make sure the device was on, to not leave
18 the device on. And to capture conversations related
19 to the Molina murder and the conspiracy to kill the
20 corrections officials.

21 Q. Did it ever concern you that Mr. Duran
22 might, you know, lead somebody into a conversation
23 just to record them?

24 A. Well, yes. I mean, I have that concern
25 with all informants. But I have to let the recording

1 speak for itself.

2 Q. And I guess that's my point. Can the
3 recording really speak for itself, if it's not
4 completed?

5 A. I think it can. If there is enough there,
6 if we can corroborate that with other information
7 that we're getting from other sources or other
8 recordings. So, you know, a partial recording on
9 itself, if an informant just brought it to me and
10 said, Mr. Lowry committed this crime, here is ten
11 seconds, that's garbage. But to have those other
12 sources I mentioned, that helps put it together for
13 us.

14 Q. Did it ever cause you concern -- okay, you
15 have -- Mr. Duran has the ELSUR device and at the
16 same time he's issued a cellphone by the FBI;
17 correct?

18 A. Yes.

19 Q. And you were in relative -- well, let's put
20 it this way: You could communicate with Mr. Duran
21 via text messaging if and when you wanted to?

22 A. I could.

23 Q. In the text messages that were disclosed in
24 this case, at various times in early -- well, after
25 Mr. Baca arrived back to Level 6 -- I believe it was

1 October 22, 2015?

2 A. That sounds about right.

3 Q. And at this point in time, Mr. Duran called
4 it his mission to record Mr. Baca regarding the
5 Marcantel --

6 A. I think I remember seeing that.

7 Q. Was that your understanding of his mission?

8 A. It was part of it.

9 Q. But when you first met him in August, he
10 had told you Mr. Baca is eager to make this Marcantel
11 hit happen?

12 A. I don't know. Because, I mean, it took us
13 some time to get Mr. Baca back. And I didn't
14 communicate that to Duran until right before he was
15 there. Like, I wouldn't be communicating our
16 investigative plans to any of the informants until
17 they needed to know.

18 Q. So do you recall drafting an FBI report
19 after you first met Mr. Duran on the 5th of August,
20 2015?

21 A. I don't know if I did that one. But I'm
22 sure there is a report.

23 MR. LOWRY: May I approach, Your Honor?

24 THE COURT: You may.

25 Why don't we do this: This is probably a

1 good time for us to take our afternoon break. So why
2 don't we be in recess for about 15 minutes.

3 MR. LOWRY: That's fine, Your Honor.

4 (The Court stood in recess.)

5 THE COURT: Let's go back on the record.

6 It looks like every defendant has an attorney. But
7 make sure that your co-defendant has an attorney.

8 All right. Mr. Acee, I'll remind you that
9 you're still under oath.

10 Mr. Lowry, if you wish to continue your
11 cross-examination of Mr. Acee, you may do so at this
12 time.

13 MR. LOWRY: Thank you, Your Honor. I was
14 going to approach the witness to refresh his
15 recollection.

16 THE COURT: You may.

17 MR. LOWRY: Thank you.

18 Q. Now, what I've handed you, just to refresh
19 your recollection, is that your initial report
20 documenting the initial meeting you had with
21 Mr. Duran?

22 A. Yes, sir.

23 Q. Okay. And there is a highlighted portion.
24 I think it's on the third page of that. But at the
25 top of that highlighted portion, you drafted your

1 report, and according to your report, Mr. Duran
2 reported to you that Mr. Baca was eager to hit the
3 Secretary of Corrections, Gregg Marcantel?

4 A. Yes, sir.

5 Q. So my question to you is: Did it surprise
6 you at all, when Mr. Duran began to record Mr. Baca,
7 and there was no initial interest in putting a hit on
8 Secretary Marcantel?

9 A. No, I wasn't surprised.

10 Q. Were you surprised when Mr. Duran tried to
11 ask -- not tried, but Mr. Duran point-blank asked Mr.
12 Baca if he wanted to hit Secretary Marcantel, and Mr.
13 Baca said no?

14 A. I think you're referring to transcripts
15 that we went over.

16 Q. That's correct, and it's part of the
17 motion. But --

18 A. I'm sorry? The question was, was I
19 surprised?

20 Q. Correct.

21 A. No.

22 Q. Why not?

23 A. Well, from what I recall from that
24 transcript, they were speaking over each other, too.
25 And Baca's response, if I remember correctly, was

1 just simply, "No," with no elaboration after that.
2 So I don't know if that "no" was in relation to him
3 asking the question about hitting Marcantel, or if it
4 was an earlier question.

5 Q. Okay. But these initial recordings -- and
6 if we look at them again on Defendant's Exhibit D --
7 I mean, all the recordings -- and I have all the
8 transcripts here -- but could you point to a single
9 transcript in the month of October where Mr. Duran
10 recorded Mr. Baca, where Mr. Baca said: I want to
11 hit Secretary Marcantel?

12 A. I don't know if those are in the October
13 transcripts.

14 Q. Okay. So the answer to my question is no,
15 none of these recordings in October?

16 A. Well, I don't want to be uncooperative with
17 you. But my answer is I don't know what's in the
18 October transcripts without looking at them. And
19 this isn't a representation of the transcripts.

20 Q. Fair enough. And I was going to try to
21 avoid doing this. But would you like to see a set of
22 the transcripts for the month of October?

23 A. If you'd like me to review them, I will.

24 Q. Do you have an independent recollection of
25 whether there was any kind of representation made by

1 Mr. Baca during the month of October, that he wanted
2 to see the Secretary Marcantel murdered?

3 A. My recollection is those conversations
4 picked up later in the investigation throughout the
5 last couple of weeks of November.

6 Q. So I want to come back to the question that
7 I was really driving at. If Mr. Duran told you that
8 Mr. Baca was so eager to have Mr. Marcantel killed,
9 why weren't you concerned that you have, what, nine
10 days and hours worth of recordings here with nothing
11 on it?

12 A. Sure. Well, Mr. Duran's reporting to us
13 that Baca was eager to hit Santistevan was actually a
14 conversation from 2013, I believe, is what Duran was
15 relating, that happened down here in Las Cruces at
16 the Southern New Mexico Correctional Facility.

17 Duran eased his way into that conversation
18 over a six- to eight-week period. He didn't open up
19 with that. I don't know if I'm answering your
20 question.

21 But we're combining the statement made in
22 2013 with no recorder. Then now we've introduced a
23 recorder, and we've asked him to get Baca to talk
24 about that again.

25 Q. How do you know that statement in 2013 was

1 actually made?

2 A. Well, I can't be certain of it. But I've
3 heard it from three people that were in the hole, or
4 in the Ed Seg area together.

5 Q. Because when we started this conversation
6 this afternoon, I believe what you said was, if it
7 wasn't on the recording, it sort of didn't really
8 happen, you missed your opportunity?

9 A. I prefer a recording. If three different
10 sources are telling me something happened, that may
11 not be enough to prosecute them. I don't make those
12 decisions. But I prefer a recording.

13 Q. Do you think Mr. Duran was a skilled
14 manipulator?

15 A. Probably.

16 Q. Do you think he manipulated the people
17 around him?

18 A. Depending who they were.

19 Q. Did he manipulate women?

20 A. Probably.

21 Q. From your review of the recordings, does he
22 manipulate women in his life?

23 A. I think he's pretty skilled at that.

24 Q. And he manipulates people to get money?

25 A. He manipulates people to give him money?

1 Q. Well, he manipulates women to give him
2 money.

3 A. He may have. I can't think of any
4 circumstances where I saw that.

5 Q. Have you listened to any of the regular
6 jail recordings?

7 A. I've listened to a lot of jail recordings.

8 Q. Did you have any of your staff listen to
9 the jail recordings with Carolyn Bueno?

10 A. I don't -- I'm not familiar with that
11 conversation.

12 Q. But you would agree that he is a very
13 skilled manipulator?

14 A. No. I mean, does Mr. Duran -- did
15 Mr. Duran manipulate me? I don't think so. I think
16 it depended who it was.

17 Q. Well, I didn't say that. But with regard
18 to the inmate population.

19 A. I think Mr. Duran has the gift of gab, and
20 some people fall for it, and some people don't.

21 Q. So I'm going to hand you what I'm going to
22 mark as Defendant's Exhibit E. You remember the
23 bullet points you were talking about in the FBI
24 report you did, the FD 1023?

25 A. Yes, sir. I think Mr. Sainato did this

1 one. But I do remember it.

2 Q. And if we look at this call here, it's the
3 10th call, this initial number, the 0730, that's the
4 actual ELSUR device that's being employed; correct?

5 A. Yes, sir.

6 Q. And the .010, that would be the 10th
7 recording on this particular recording set; correct?

8 A. Yes, sir.

9 Q. So jumping from that back to Defendant's
10 Exhibit D, that would be this call right here, 10,
11 the 3 minute and 26 second call?

12 A. Yes.

13 Q. Now if, we look at --

14 THE COURT: Did you want to move this
15 admission?

16 MR. LOWRY: Not for -- well, not for this,
17 Your Honor. I was just trying to direct Mr. Acee's
18 attention to this, so we could really come back to
19 Defendant's Exhibit D to talk about this call.

20 Q. So what we know about this particular call,
21 call 10, is it would have begun --

22 THE COURT: I guess I'm a little concerned
23 with him testifying, for the clarity of the record,
24 about Exhibit E, and then I not being able to find
25 Exhibit E when I get ready for it.

1 MR. LOWRY: Well, I'm just trying to set up
2 the length of this call, Your Honor, so we can
3 understand the transcript a little better. But --

4 THE COURT: Well, either don't use E, or
5 let's try to move it and let me make a decision on
6 it.

7 MR. LOWRY: Sure.

8 THE COURT: Any objection? Do you want to
9 move it?

10 MR. LOWRY: I'll move it.

11 THE COURT: Any objection?

12 MR. CASTELLANO: No objection.

13 THE COURT: Anybody else?

14 All right. So Exhibit E will be admitted
15 into evidence. I just got to keep these --
16 otherwise, I'm not going to be able to reconstruct
17 the record when look at it.

18 Q. So Exhibit E would be call 10 on Exhibit D;
19 correct? If I'm representing to you that Exhibit E
20 is the 10th call.

21 A. Yes, sir.

22 Q. And this transcript would have taken place
23 on the 23th of October, 2015, from 2100 hours?

24 A. 9:46 p.m., I believe.

25 Q. 9:46 to --

1 A. 9:50.

2 Q. -- 9:50? So -- I mean, this recording was
3 made just six minutes after the prior recording; is
4 that correct, 10?

5 A. Yes.

6 Q. And then, if you look -- and then the next
7 recording would have been two hours later, roughly?

8 A. Yes.

9 Q. Number 11?

10 A. I agree.

11 Q. So it appears from the time stamps they're
12 talking, and he just turned the recorder on and off
13 when he feels like it?

14 A. Yes.

15 MR. LOWRY: May I approach, Your Honor?

16 THE COURT: You may.

17 Q. I'm going to hand you what I've marked as
18 Defendant's Exhibit E. And for everybody else, this
19 is DeLeon Bates No. 6043.

20 And looking at that transcript, is it
21 fairly obvious that this takes place in the middle of
22 a conversation?

23 A. I think that it did. I guess it could
24 start out with "Pup"'s initial statement. But
25 probably started in the middle of the conversation.

1 Q. And if you look at the last page, at DeLeon
2 6046, literally the recording stops in the middle of
3 a sentence?

4 A. Correct.

5 Q. And this was a transcript prepared by your
6 office?

7 A. Yes, sir, it was.

8 Q. So would you agree with me that this is
9 nothing more than a portion, a snippet, of what
10 appears to be a longer conversation that evening?

11 A. It's a portion of a conversation that we
12 don't have the start or end of.

13 Q. And we have no way of knowing, as we sit
14 here in the courtroom today, the other components of
15 that conversation, other than the potential testimony
16 from Mr. Duran or Mr. Baca?

17 A. I believe that.

18 Q. But, in keeping with your policy of
19 preferring a recording, why wouldn't you have
20 assisted Mr. Duran with some advice, Hey, can you
21 capture everything?

22 A. Well, he'd be following my advice if that
23 other -- that missing information wasn't pertinent to
24 the crimes we were looking at.

25 Q. Right. But if -- hypothetically, if

1 Mr. Duran is trying to manipulate somebody into
2 saying something that benefits him, it doesn't
3 necessarily benefit you, does it?

4 A. I don't know. I'm not sure.

5 Q. Well, I mean, let me boil it down to its
6 essence. If the plot to kill Mr. Marcantel really
7 sprung from Mr. Duran, and he had to convince
8 somebody that it's a good idea, that's not helpful to
9 your case, is it?

10 A. No. But it just depends.

11 Q. Well, if Mr. Duran is working for you --

12 A. Yes.

13 Q. -- and you had informed him via text that
14 he's a government agent --

15 A. Yes.

16 Q. -- and you informed him via text that he
17 can't participate in the conspiracy; correct?

18 A. Okay. These are the normal type of
19 conversations we have.

20 Q. Right. I mean, these are things you
21 actually texted Mr. Duran?

22 A. I'll take your representation.

23 Q. It wouldn't help you to have a government
24 agent precipitate a crime of that nature, a murder of
25 the Secretary of Corrections of New Mexico?

1 A. I'm just struggling with this one, because
2 we do reverse operations, where -- and I've worked as
3 an undercover agent in the past -- where we are
4 participating in that crime. To an extent, you know,
5 we're soliciting it or we're trying to get people to
6 join us. So that's why I'm hesitating. Maybe I'm
7 not understanding what you're asking.

8 Q. Okay. But, well, if it was Mr. Duran's
9 idea, that's not a good thing, is it?

10 A. If it's Duran's idea to kill the Secretary?
11 No. And there is no other conversation about it?
12 No.

13 Q. There is no real way -- you didn't have,
14 from what I'm understanding through your testimony,
15 there was no police mechanism with Mr. Duran to say:
16 We want the whole enchilada, not just a part of it?

17 A. In terms of conversation?

18 Q. Um-hum.

19 A. No. And we didn't want the whole enchilada
20 if it didn't pertain to those two conspiracies, or
21 the SNM. We didn't want a lot of personal business,
22 because we're losing valuable recordings.

23 Q. But, in fairness, you wanted inculpatory
24 information?

25 A. No. I'd take exculpatory, if it was on the

1 topic of the SNM and the hit on Marcantel, I'd take
2 that, too, to be fair, certainly.

3 Q. But if you're Mr. Duran, and you realize
4 your paycheck is dependent on the inculpatory
5 information, where is the incentive for Mr. Duran to
6 get the exculpatory information?

7 A. I don't agree with saying there was a
8 paycheck. Because I didn't discuss that with him.
9 And I didn't tell him he was getting a paycheck,
10 or --

11 Q. Your very first recorded conversation with
12 Mr. Duran, on September 10, 2015, discussed Mr. Duran
13 getting commissary money; correct?

14 A. It may have, I guess, if we're going to
15 count buying chips at the store a paycheck. I
16 thought you meant something more substantial. I'm
17 sorry.

18 Q. Well, in fairness, he did get something
19 more substantial, didn't he?

20 A. He did in the end, yes.

21 Q. Did he in the middle?

22 A. No.

23 Q. He didn't get a substantial sum of money at
24 the beginning of 2016?

25 A. He had at the conclusion of my handling

1 him, before I relocated him, yes. If you're saying
2 at the middle of his time as a FBI informant, that's
3 fair.

4 Q. Let's just say before he was released from
5 the Department of Corrections.

6 A. Yes. For one reason only. Into the
7 federal fiscal year, I had to spend that money or it
8 was going back.

9 Q. And that's why you ended up having to go to
10 the Department of Corrections and depositing \$25,000
11 on his commissary account?

12 A. Yes, I had to do that by September 1st, I
13 believe.

14 Q. And that was literally a calendaring issue
15 with the federal budget?

16 A. Unfortunately.

17 Q. But he was still incarcerated with the
18 Department of Corrections at that time?

19 A. Yes, sir.

20 Q. But it was clear to you, from the inception
21 of your relationship with him, that Mr. Duran was in
22 it for the money?

23 A. I don't agree. At the time I was working
24 over a dozen of these guys, targeting this group
25 right here. And I wasn't talking to him about money

1 or paying him money.

2 Q. Okay. Well, Mr. Duran wanted his chips?

3 A. Oh, the commissary. Yeah, let me back up.
4 Sure. If we're going to talk about commissary
5 checks, that was important to all the cooperators,
6 and I did provide that.

7 Q. But for Mr. Duran, it wasn't just
8 commissary money for him, you actually had to go
9 visit Grace Duran at her house and deliver money to
10 her?

11 A. Not at her house. But, yes.

12 Q. But to her?

13 A. Correct.

14 Q. For her kids?

15 A. I don't -- if that's where he wanted his
16 money to go. I don't ask questions beyond that.

17 Q. Do you recall a conversation that you had
18 with Mr. Duran on November 20, 2015?

19 A. You'd have to remind me.

20 MR. LOWRY: May I approach, Your Honor?

21 THE COURT: You may.

22 Q. And this is Defendant's Exhibit F.

23 MS. JACKS: Is there a Bates?

24 MR. LOWRY: There is.

25 Q. If you want to take a moment to review

1 that. Could I direct your attention to the bottom of
2 page 9. Is it fair to say this conversation you had
3 with Mr. Duran, you're sort of trying to loop "Styx,"
4 who is Gerald Archuleta, you're trying to loop him
5 into this scheme to murder Secretary Marcantel?

6 A. I think I'm trying to get "Styx," Gerald
7 Archuleta, and Anthony Baca talking on that phone.

8 Q. And as part of that conversation,
9 Mr. Duran, at the bottom of page 9, basically offers
10 to -- and I'll in my words -- manipulate each one of
11 the players to get them on the phone together, to
12 benefit your desire to have them talk to each other?

13 A. Well, I don't agree with you about the
14 manipulation part. He's just simply saying, Yeah, I
15 can tell "Pup" that "Styx" wants to talk, and I can
16 tell "Styx" that he wants to talk.

17 Q. Well, we can disagree with the word
18 "manipulation." But if Duran was to tell "Styx" that
19 "Pup" wanted to talk to him, that would be a lie,
20 wouldn't it?

21 A. It would be a lie -- well, maybe he does
22 want to. But he'd be driving that, yes.

23 Q. And likewise, you had no idea whether
24 "Styx" wanted to talk to Mr. Baca?

25 A. No, I had a feeling that he would, though.

1 Q. Okay. And you don't disagree with me that
2 probably neither Mr. Archuleta, nor Mr. Baca, wanted
3 to talk to each other?

4 A. I think that they would have talked to each
5 other.

6 Q. You think they would have?

7 A. I think they would have.

8 Q. But that's not what Mr. Duran told you?

9 A. On the bottom of 9?

10 Q. Well, I mean, he says that Mr. Baca didn't
11 want to talk to Mr. Archuleta at all because he
12 thought Mr. Archuleta had a big mouth?

13 A. I didn't see that, sir. Where are you on
14 page 9? I'm sorry.

15 Q. I'm not on page 9. I think if you back
16 up -- look at the bottom of page 6.

17 A. I don't see it there, sir.

18 Q. Well, you say -- pardon me, that's when
19 you -- you're the "Unidentified FBI agent" in this
20 conversation, are you not?

21 A. I think so.

22 Q. And when you say "he talks a lot," you're
23 talking about Mr. Archuleta?

24 A. Yes.

25 Q. So if you look at the top at page 2, about

1 two-thirds of the way down, lines 15 through 20,
2 Mr. Duran tells you that, "Nah, he wouldn't ask
3 'Styx'" -- meaning that Mr. Baca wouldn't talk to Mr.
4 Archuleta?

5 A. I do see those lines.

6 Q. Okay. And you agree with me that in Eric
7 Duran's estimation, if you look at the top of page
8 2 -- or pardon me, the top of page 3 -- Eric Duran
9 says, "No, he likes him. It's just that he has a big
10 mouth"?

11 A. That is what Mr. Duran says.

12 Q. By that he's meaning that Mr. Baca wouldn't
13 talk to Mr. Archuleta because Mr. Archuleta talks too
14 much?

15 A. He wouldn't talk to him about the Marcantel
16 hit, or whatever hit they're talking about, because
17 he has a big mouth.

18 Q. Right. And that's what you wanted,
19 Mr. Duran to facilitate that conversation?

20 A. Yes.

21 Q. And Mr. Duran was willing to lie to each
22 one of the individuals to get them on the phone
23 together?

24 A. Yes.

25 Q. But that still never happened, did it?

1 A. I don't -- we do have a few three-way calls
2 with "Styx" and guys on the inside at the Level 6.
3 But I don't know that Mr. Baca was part of that.

4 Q. But my question here is -- I mean, you
5 didn't say or do anything to kind of nudge Mr. Duran,
6 and say, you know, maybe that's not a good idea to
7 lie to Mr. Archuleta to get Mr. Baca on the phone, or
8 mislead Mr. Baca to get Mr. Archuleta on the phone?

9 A. No, I didn't do that.

10 Q. You were here to hear Mr. Sapien testify?

11 A. Yes.

12 Q. Would you agree with Mr. Sapien that the
13 ELSUR device was switched out with Mr. Duran
14 simultaneously?

15 A. If he said that, I believe it.

16 Q. Okay. So according to Mr. Sapien's
17 testimony, Mr. Duran would have always had an ELSUR
18 recording device with him?

19 A. He should have. That was the plan.

20 Q. Did you ever ask Mr. Duran, after the
21 initial spate of recordings in October, after Mr.
22 Baca arrived back at the facility why, you know, the
23 frequency of the recordings started to taper off?

24 A. No.

25 Q. Okay. Did it concern you that days would

1 go by without a recording being made?

2 A. No.

3 Q. Why not?

4 A. Because they'd already covered it. And to
5 talk about it too much, I think would have been
6 foolish on Eric Duran's part.

7 Q. What do you mean "they already covered it"?

8 A. Well, as the -- as you said, as the
9 recordings started to taper off, they'd already
10 discussed and put in motion the hit on both guys.
11 And the belief was that Mario Montoya was on the
12 street, going to hit Marcantel any moment. I think
13 too much talk sometimes is like a nervous talk, and,
14 you know, these guys are -- these are some
15 experienced guys. So to do that would be foolish.

16 Q. Well, where did you get the sense that Mr.
17 Baca understood that somebody on the street was going
18 to hit Marcantel?

19 A. Through his conversations over the recorded
20 telephone with Mario Montoya, primarily.

21 Q. But those recordings don't happen till much
22 later, until November?

23 A. I didn't know you were putting a time limit
24 on that question. I'm sorry.

25 Q. Well, no, I'm just talking about October

1 here.

2 A. In October, I wouldn't have known the full
3 extent of that.

4 Q. In October -- if we look at what's called
5 number 19, call number 19 would be the call where Mr.
6 Baca tells Mr. Duran that he's not interested in
7 hitting Mr. Marcantel?

8 A. By saying "No"?

9 Q. Correct, by saying "No."

10 A. I don't think that excludes him, sir, that
11 simple "no" didn't negate that. We fleshed out so
12 much more information subsequently.

13 Q. Subsequently?

14 A. Yes, sir.

15 Q. After he said that?

16 A. If that "no" was even in the right place in
17 that transcript, yes.

18 Q. All right. I'm going to switch over from
19 talking about the ELSUR recordings to talking about
20 the cellphone, if I can real quickly. Was it -- did
21 you ever instruct Mr. Duran not to delete material
22 off his cellphone?

23 A. I may not have. I may not have.

24 Q. Did you think Mr. Duran thought he was free
25 to delete whatever was on his cellphone?

1 A. I don't know. Because I told him that
2 everything on the phone we could see. And I gave him
3 some admonishments about what to stay off of,
4 specifically, on the phone. So I gave him the belief
5 that, you know, we were seeing everything as it was
6 happening. And I think he believed that, because
7 sometimes in his conversations he'd say, "Well, did
8 you just hear that?" And we didn't always, but we
9 represented that we were able to do that with him.

10 Q. Now, in fairness, were you able to look at
11 the text messages in real-time on the cellphone?

12 A. I think near real-time, we could. There is
13 a -- you know, I work on the second floor of the
14 building with the rest of the gang squad. And the
15 wire room is downstairs. So it's a matter of walking
16 down there or sitting in front of it. So it's
17 possible.

18 Q. So you would capture the actual language,
19 the words of the text, as they came across the phone
20 in real-time?

21 A. There may have been a delay. Just given my
22 understanding of how the Bureau's wire interception
23 program works, there could be a little bit of a
24 delay.

25 Q. So do you have -- are you familiar with

1 what we've referred to over the course of the
2 hearings as that master text file, the 800-some-odd
3 pages of all the texts that were gathered from
4 Mr. Duran's phone?

5 A. Was that in Ms. Sirignano's motion?

6 Q. I believe it was.

7 A. I have looked that over, yes.

8 Q. In your estimation, was that the Department
9 of Justice's representation of all the texts that
10 were disseminated or acquired using Duran's
11 cellphone?

12 A. I think her attachment was from her expert.

13 Q. No, but I'm talking about the disclosure
14 from the Department of Justice.

15 A. Are you asking me if they match?

16 Q. No. I'm asking you if that was the
17 Department's representation of all the texts that
18 were sent and received from Mr. Duran's cellphone?

19 A. I believe so. That was contained on the
20 disc from our wire intercept unit, and that's what I
21 turned over.

22 Q. Okay. And that was disclosed to all the
23 defense attorneys in the room as part of the
24 discovery in this case?

25 A. Yes, sir.

1 Q. Did you ever have an opportunity to compare
2 that file to the Verizon data that was also disclosed
3 in this case?

4 A. Which files am I comparing?

5 Q. Well, the master text doesn't have a Bates
6 number, but if we look at DeLeon Bates No. 2385, that
7 I'll mark as 2385 through 2466, but it's a document
8 that looks like this, what I've marked as Defendant's
9 Exhibit G?

10 THE COURT: Do you move its admission?

11 MR. LOWRY: I do move its admission, Your
12 Honor.

13 THE COURT: Any objection, Mr. Castellano?

14 MR. CASTELLANO: Can I get another look at
15 it? I can't see it on the screen. I don't believe I
16 have an objection. No objection, Your Honor.

17 THE COURT: And you didn't move F. Do you
18 want to move F?

19 MR. LOWRY: I would move F as well, Your
20 Honor.

21 THE COURT: Any objections to F?

22 MR. CASTELLANO: No, Your Honor.

23 THE COURT: Any objection to F or G from
24 defendants? Defendant Baca's Exhibits F and G will
25 be admitted into evidence.

1 Q. I'll try to zoom in on this a little bit.
2 But you recognize data like this as something you
3 would have come across in the course of your
4 investigation?

5 A. Yes, sir.

6 Q. And this -- if I understand this document
7 correctly, this would be what you're talking about is
8 the intercepts from the Verizon unit as it came in
9 off the cellphone?

10 A. I would call these like the call detail
11 records.

12 Q. And would these would be from the carrier?

13 A. Yes, sir.

14 Q. I guess my question is: If you compare
15 this document, Defendant's Exhibit G, to the master
16 text list that was disclosed by the Department of
17 Justice, none of Gerald Archuleta's texts, the ones
18 you can see that took place on Defendant's Exhibit
19 G -- let me just for an example, bear with me -- are
20 on the master text file. Do you have any idea why we
21 don't have copies of those texts?

22 A. Were the texts completed, or was it just an
23 attempt? Because the call detail record might show
24 an attempt. But if the text was not sent, or the
25 phone was off, it wouldn't contain any text.

1 Q. Well, my view of this seems to lend the
2 reading that they were completed.

3 A. Well, I think on -- the call detail records
4 are a little tricky, because it will indicate the
5 attempts, but sometimes there is no text because it
6 didn't go through.

7 Q. So if we look at DeLeon 2420, at the top of
8 the page, you see incoming and outgoing texts between
9 Mr. Duran and Mr. Archuleta. So it looks like there
10 is a back and the forth, if you will.

11 A. I disagree, sir. And the reason I disagree
12 is I'm looking at the times, and I think that's an
13 attempt to send, an attempt to send. And I think
14 Archuleta, or the target phone, is off, and it's not
15 going through, based on the duration there.

16 Q. So you just think it's a coincidence on the
17 same day, within 10 minutes of each other, that Duran
18 is trying to text Archuleta, and then Archuleta is
19 trying to text Duran?

20 A. It may be. I'm not sure. It might have to
21 do with the signal in there. There are a lot of
22 possibilities. So it's a tough answer.

23 Q. And then, if we look at DeLeon at 2417, as
24 part of Defendant's Exhibit G, the same thing. These
25 would be a series of texts on October 24, 2015, both

1 incoming and outgoing in a relatively short period of
2 time. It looks like a back and forth.

3 A. I would agree with you, Mr. Lowry. I can
4 represent to you that what was collected by the
5 FBI -- not handled by me, other than I obtained it
6 and turned it over.

7 Q. And I'm not suggesting otherwise. I wasn't
8 aware, until you just spoke on the stand, that the
9 FBI had the capability of pulling down the text
10 language in real-time.

11 A. Well, I said near real-time, I believe.
12 You know, spending a lot of time in wire rooms, that
13 the calls might be delayed because there is a switch
14 through the phone company.

15 Q. Right.

16 A. Same thing with the text; routed to an FBI
17 server, then into our office. So I think there is
18 probably a delay. It's probably not very much.

19 Q. But if I understand your testimony
20 correctly -- and this might clarify things for me --
21 is that, if Mr. Duran deleted a series of texts from
22 his phone, the FBI would still have them?

23 A. I believe that's correct.

24 Q. Okay. Would the same hold true for images?

25 A. No, not necessarily.

1 Q. Why not?

2 A. Well, it just depends. First, I think it
3 depends on what the court order says. And in this
4 case, I'd have to look at it. I think it depends on
5 the capabilities of the phone company and limitations
6 there. I think in this case, Verizon can do that.
7 And then whether or not our technically trained
8 agents set up the wire intercept to collect that.
9 For instance, as you know, email or internet traffic
10 could be captured. But, in this case, what the
11 wiretap was set up to capture was the text messages
12 and the phone calls.

13 Q. Right. But if somebody was clever and
14 tried to evade detection, and they knew that, they
15 could just take a picture of a note, and then send
16 the note over the cellphone. And then what you're
17 telling me is you wouldn't be able to see that?

18 A. In this case, we would not have been able
19 to see that, I don't believe.

20 Q. How were you going to capture that material
21 that Eric Duran -- I mean, let's cut to the chase --
22 a cellphone is contraband inside the jail; correct?

23 A. Normally, it is.

24 Q. Normally. Did you give Mr. Duran license
25 to download pornography or have pornography sent to

1 him over his cellphone as a benefit for his
2 cooperation?

3 A. No. And I specifically told him I better
4 not find any of that on his phone.

5 Q. But you're telling me you had no way to
6 determine that.

7 A. But he didn't know that. You're right, I
8 couldn't go to his phone and look through. And when
9 I went and conferred with our tech agents on what
10 exactly we were capturing, that's when I learned we
11 weren't capturing photos, and we weren't capturing
12 email, because my court order didn't ask for that.

13 Q. So when Mr. Duran struck up his
14 relationship with Felicia Cordova, the stripper who
15 was sending him photographs, you didn't say, Wa sha,
16 what are you doing, bro?

17 A. I didn't see those photographs.

18 Q. Apparently not. But you did see the text?

19 A. Well, the text would have been captured.
20 I'm not claiming I saw the text either. But the text
21 would have been captured.

22 Q. Right. And you and your staff were
23 reviewing the texts sort of real-time?

24 A. We had the ability to review them
25 real-time.

1 Q. Okay. Were you interested in reviewing
2 them real-time?

3 A. I was interested in having some of the
4 agents verify what Duran was representing.

5 Q. And if he's representing to you he's not
6 getting pornography, but he's getting pornography, is
7 that a concern of yours?

8 A. If he tells me he's not doing something,
9 and he's doing it, yeah, that's always a concern.

10 Q. And that's always a concern with Mr. Duran,
11 isn't it; him saying he's not going to do something
12 that he does?

13 A. It's a concern with all informants,
14 particularly within the SNM.

15 Q. Particularly with Mr. Duran?

16 A. I'd lump him into that category.

17 Q. Let's talk about the admonishments you gave
18 him with specificity. What admonishments did you
19 give Mr. Duran?

20 A. I have them. I can refer to them.

21 Q. Please do.

22 A. So the initial admonishments would have
23 been done by Agent Brusuelas. Do you want me to skip
24 those and just go to the ones I've done?

25 Q. Yes.

1 A. So the first time he's admonished by myself
2 or one of the agents that working on the case with me
3 was 2016. The specific date was March 24. The
4 admonishments were the standard four that I've
5 testified about before, that are applicable to all
6 sources. And that is: The CHS's assistance and the
7 information provided to the FBI are entirely
8 voluntary.

9 Number 2, the CHS must provide truthful
10 information to the FBI.

11 Number 3, the CHS must abide by the
12 instructions of the FBI, and must not take or seek to
13 take any independent actions on behalf of the US
14 Government.

15 Number 4, the US Government will strive to
16 protect CHS's identity, but cannot guarantee it will
17 not be divulged.

18 And then there are some additional
19 admonishments that I thought were applicable to
20 Mr. Duran. And I can read through those. There are
21 four additional ones.

22 Q. Sure. Would you read through them quickly.

23 A. "The FBI, on its own, cannot promise or
24 agree to any immunity from prosecution or other
25 consideration by an FPO" -- which is a Federal

1 Prosecuting Office -- "a state or local prosecutor,
2 or a court in exchange for the CHS's cooperation
3 because the decision to confer any such benefit lies
4 with the exclusive discretion of the prosecutor or
5 court. However, the FBI will consider, but not
6 necessarily act upon, advising the appropriate
7 prosecutor of the nature and extent of the CHS's
8 assistance to the FBI."

9 The second additional admonishment was,
10 "The CHS is not authorized to engage in any criminal
11 activity and has no immunity from prosecution for any
12 unauthorized criminal activity."

13 And then in parentheses it says, "This
14 instruction is not necessary for CHSs who have such
15 authorization."

16 Number 3, "The CHS is not an employee of
17 the US Government, and may not represent himself or
18 herself as such."

19 And the 4th, and last one is, "The CHS may
20 not enter into any contract or incur any obligation
21 on behalf of the US Government except as specifically
22 instructed or approved by the FBI."

23 So those were the 2016 admonishments.

24 Q. So you didn't give -- if I understand your
25 testimony correctly, you didn't give Mr. Duran any

1 admonishments when you took over handling him in
2 August of 2015?

3 A. No. His admonishments -- well, let me --
4 yes and no. By policy, his admonishments were still
5 good, because Agent Brusuelas had done it. So that
6 fulfilled the FBI's. Now, me personally, as an
7 agent, giving someone extra admonishments or
8 instructions outside of policy, I regularly do that.

9 Q. Did you regularly do that with Mr. Duran?

10 A. Over the lifetime of Mr. Duran working as
11 an informant, yes.

12 Q. Okay. Between August of 2015 and the
13 takedown of the SNM, December 3, did you give him
14 those admonishments when he was making recordings of
15 people?

16 A. I don't think I did give him any other --
17 nothing is jumping out at me.

18 Q. Did you have any concerns about Mr. Duran
19 using his phone to engage in gambling via Fantasy
20 Football?

21 A. Yes.

22 Q. What did you tell him?

23 A. I think I got a notice from Verizon that
24 his data was used up like in a record amount of time,
25 and I figured he was looking at something online. So

1 then I went to the techs, found out -- I thought I
2 had access to all that, and I didn't. I just had
3 text and phone call. So then I did admonish him
4 about what he was looking at. And he said it was
5 Fantasy Football. And I told him to stop doing that.

6 Q. Did he stop doing it?

7 A. I believe he did, because his data went way
8 down.

9 Q. Have you ever reviewed the forensic
10 analysis of Mr. Duran's phone?

11 A. Was that attached to Ms. Sirignano's
12 motion?

13 Q. I don't know. This was -- well, Nancy
14 Stemo did that in March 20 of 2017.

15 A. She told me about it. I don't know that I
16 reviewed it.

17 Q. Okay. Would it surprise you to learn that
18 they were only four texts on this phone when she
19 looked at it forensically?

20 A. No. You're going to be kind of hard
21 pressed to get something that surprises me. But I
22 believe you.

23 Q. Would it concern you? Let me rephrase the
24 question.

25 A. Yeah, it may be a minor concern, but then

1 again, no, because the wire captured the text
2 messages.

3 Q. If you look at the Stemo Cellebrite report,
4 and compare it to the text messages that were
5 disclosed to the defense teams, why weren't three of
6 the four text messages in the Cellebrite report in
7 the master text file?

8 A. I don't know that they weren't. I mean, if
9 they were -- if the text messages were between the
10 time we had the wire intercept up, they should have
11 been captured.

12 Q. Well, there are only four text messages in
13 the report, and they are all on the day of the
14 takedown, December 3, 2015.

15 A. Mr. Lowry, I'm not sure. I mean, it could
16 have something to do with I bought a pretty small,
17 pretty cheap phone from Walmart. I don't know if it
18 has to do with that. But Agent Stemo is very
19 competent, but that was probably her first time
20 dumping a phone. I'm not really sure.

21 MR. LOWRY: May I have a moment, Your
22 Honor?

23 THE COURT: You may.

24 MR. LOWRY: No further questions, Your
25 Honor.

1 THE COURT: All right. Thank you, Mr.
2 Lowry.

3 Ms. Sirignano.

4 MR. LOWRY: May I approach and get the
5 exhibit?

6 THE COURT: You may.

7 Ms. Sirignano, did you want to
8 cross-examine Mr. Acee?

9 MS. SIRIGNANO: Yes, please, Your Honor.

10 THE COURT: Ms. Sirignano.

11 MS. SIRIGNANO: Are we on G, Your Honor?

12 THE COURT: Those are Baca's Defendant's
13 Exhibits, so go ahead and start your running with
14 Christopher Garcia's Exhibit A, B, or whatever you
15 want.

16 MS. SIRIGNANO: Thank you, Judge.

17 THE COURT: I don't think you have any
18 exhibits yet on this one, right?

19 MS. SIRIGNANO: No, Your Honor.

20 May I have a moment, Your Honor?

21 THE COURT: You may.

22 EXAMINATION

23 BY MS. SIRIGNANO:

24 Q. Agent Acee, good afternoon.

25 A. Good afternoon.

1 Q. I'm going to start with the extraction
2 report, the Cellebrite report. Did you see the
3 extraction report that Agent Stemo did?

4 A. I think I did.

5 Q. Was that recently?

6 A. No.

7 Q. Let me show you what's been marked as Chris
8 Garcia Exhibit A. Does that look like the report
9 that you reviewed?

10 A. Yes.

11 Q. And that's Ms. Stemo's name right there.
12 So that would mean that she ran this report?

13 A. Yes.

14 Q. That's your Albuquerque case file number?

15 A. Yes.

16 Q. And the date that she ran this report is
17 here, March 20, 2017; correct?

18 A. Yes.

19 Q. And the phone that she analyzed is the
20 Samsung CDMA, and the device name. Is that the
21 device that was given to Mr. Duran?

22 A. Yes.

23 Q. And on page 2, here, this is the phone
24 number; correct? 505-218-1861.

25 A. Yes.

1 Q. That was Mr. Duran's phone?

2 A. Yes.

3 MS. SIRIGNANO: Your Honor, I'd like to
4 move for admission of Exhibit A, please.

5 THE COURT: Any objection, Mr. Castellano?

6 MR. CASTELLANO: No objection.

7 THE COURT: Anybody else? All right. Not
8 hearing any, Christopher Garcia's Defendant's Exhibit
9 A will be admitted into evidence.

10 Q. So looking at this report, this is page 2,
11 and it contains a total of five pages?

12 A. Looks that way, yes.

13 Q. Thank you. And so the report says "SMS
14 messages, four," on the phone?

15 A. Yes.

16 Q. Total, on this page. And then on the
17 second page -- actually, this is page 3 -- sorry, I'm
18 having a hard time with this Elmo here -- there is
19 images, SMS messages, incoming. And then data files
20 towards the middle and the bottom of the page. On
21 page 4, more data files. And then on page 5, we've
22 got texts, seven texts here, and then videos, five,
23 down at the bottom here; correct?

24 A. Yes.

25 Q. And that it's. That's the whole Cellebrite

1 report. Going back to page 2, the SMS messages, it
2 says "four." And the first one is dated March 20,
3 2017; correct?

4 A. Yes.

5 Q. And it's in the draft folder. And that was
6 the day that Agent Stemo did the analysis of this
7 phone; correct?

8 A. Yes.

9 Q. Do you know if she typed the message
10 "Krazo" on this phone, or a draft text on this phone?

11 A. I don't. I think he had an automatic
12 signature though that said "Krazo."

13 Q. This is a draft text message.

14 A. I agree.

15 Q. So you don't know if Agent Stemo put that
16 there, or -- was she the only one that did the
17 analysis on this phone?

18 A. Another agent may have gone with her. I'm
19 not sure.

20 Q. Did she sign out this phone?

21 A. No.

22 Q. Where was the phone?

23 A. At the office.

24 Q. Was it in evidence?

25 A. No.

1 Q. Why not?

2 A. I didn't consider the phone evidence.

3 Q. The phone itself was not evidence?

4 A. Was not.

5 Q. Why?

6 A. I didn't consider the phone evidence.

7 Q. Yes. But I'm asking you why?

8 A. Well, over my career, anytime I've served
9 as an undercover agent, and we've done a consensual
10 wiretap, the evidence that we turn over is the
11 intercept logs, the calls, and the text messages.
12 I've never logged my own phone into evidence.

13 Q. But we're talking about a snitch phone
14 here. We're not talking about an undercover phone;
15 correct?

16 A. It's still an undercover phone. It's just
17 the operator is different.

18 Q. Correct. A sworn law enforcement officer
19 versus a convicted murderer; correct?

20 A. Yes.

21 Q. So how can the FBI explain, with the
22 original phone, after 800-some-odd pages of text
23 messages, that this phone only has four SMS text
24 messages on it?

25 A. This FBI agent can't explain that.

1 Q. Can Ms. Stemo explain that?

2 A. I doubt it.

3 Q. Why?

4 A. I don't want to put words in her mouth.

5 But she's a relatively new agent. And I think this

6 was the first download of a phone she'd ever done.

7 Q. Did she wipe the phone?

8 A. I don't believe so.

9 Q. Did she unintentionally wipe the phone?

10 A. I don't think so.

11 Q. So how did the phone get wiped?

12 A. Well, we'd have to agree the phone got
13 wiped.

14 Q. Was the phone wiped?

15 A. I don't know.

16 Q. Well, where did all the 800 pages of text
17 messages go on that phone?

18 A. Well, I don't know that they're not there.
19 Because I think your expert analyzed it, and they
20 were there.

21 Q. No, they weren't. Let me refer you to
22 Exhibit B. This is a Cellebrite report, "Crowe
23 Horwath, LLP." Do you recognize that?

24 A. Yes.

25 Q. Who is that?

1 A. Tim Bryan, your expert.

2 Q. And he reviewed the phone on December 18,
3 2017. And that's the same phone; correct?

4 A. Yes.

5 Q. Looking at the second page, the same phone
6 number there, 505-218-1861; correct?

7 A. Yes.

8 Q. And then there is four text messages there;
9 correct?

10 MS. SIRIGNANO: Your Honor, I'd move for
11 admission of Chris Garcia B, please.

12 THE COURT: Any objection, Mr. Castellano?

13 MR. CASTELLANO: No objection.

14 THE COURT: Anybody else have any
15 objection? All right. Christopher Garcia
16 Defendant's Exhibit B will be admitted into evidence.

17 Q. So these four text messages look identical;
18 yes?

19 A. They do.

20 Q. Okay. What happened with the 800-plus text
21 messages on this phone, Agent, do you know?

22 A. I don't. And I'm sorry, I think I misread
23 your motion. Sorry to say that that was in there. I
24 think you must have attached what the Government
25 turned over. I'm sorry.

1 Q. The text messages?

2 A. Yes.

3 Q. Where did that master text list come from?

4 A. It came from the FBI. Do you want the
5 specific unit, or --

6 Q. I'd just like to know how it was compiled.

7 A. Sure. So that's not my area of expertise,
8 but I can explain my understanding of it. I obtained
9 a court order; provided that to our technically
10 trained agent unit. They served the order on
11 Verizon, and then they coordinated with our
12 collection unit, if you will, which is not located
13 here in Albuquerque; it's out of the state.

14 Once the texts or phone calls or whatever
15 the data is that we're collecting is collected, it's
16 then routed to the field office from that central
17 collection unit. So that's what we were looking at.

18 I get a -- once the wire comes down, that
19 unit sends me a disc that contains all that
20 information. As I was -- actually, they send that to
21 the ELSUR technician, and I get a copy. So that's
22 what we turned over. And I believe that's what was
23 printed and turned over. And I mistakenly thought it
24 was your expert's when I read your motion.

25 Q. Okay. So it's coming directly from the

1 FBI's collection unit that works directly with
2 Verizon; yes?

3 A. Yes.

4 Q. When I was there, we had reel-to-reels,
5 so --

6 A. That was quite a while ago.

7 Q. It was.

8 So these calls, or these texts are all
9 dated December 3, 2015. Your court order expired
10 when?

11 A. Can I look at my notes?

12 Q. Yes.

13 A. December 15, 2016.

14 Q. So Verizon was still collecting the calls
15 presumably, and text messages for the FBI?

16 A. I don't know that they did. I might have
17 sent a cease and desist request or a stop request.
18 After the takedown, I might have gotten busy and it
19 might have taken a while. It could have run its
20 course. But I usually try to stop it, as not to
21 waste the time.

22 Q. Are you sure you did that, or are you
23 uncertain?

24 A. That's my normal practice. But I may have
25 failed to do that. It could have run the full course

1 of the order.

2 Q. So would it surprise you to learn that
3 these text messages, dated 12/3, are not on the FBI
4 collection unit's master text file?

5 A. If they were sent, yeah, it would surprise
6 me, yeah.

7 Q. I didn't print out 800 pages. So I'll have
8 to let you research that.

9 A. I believe you.

10 Q. And would there be any reason or
11 explanation why there would be this report from the
12 actual phone, which is the original evidence, and the
13 master text file?

14 A. I'm sorry, I didn't follow that.

15 Q. Is there a reason why the numbers would
16 occur, or the text messages would occur on the actual
17 evidence, the cellphone itself, versus the FBI
18 collection unit's master text file?

19 A. So I'm not an expert in this. But the only
20 thing I can think of is that those messages didn't
21 transmit over Verizon's network, or else they should
22 have been captured. Perhaps a better question for
23 the technical agents of Verizon, though.

24 Q. And, therefore, it would be prudent to
25 maintain the original phone in case something like

1 that occurred; correct?

2 A. If I wanted to be able to show that, I
3 would need the phone to do that.

4 Q. So you said the phone was not placed in
5 evidence. Who had access to this phone?

6 A. Me.

7 Q. Where was it?

8 A. My desk drawer, where I keep burner phones.

9 Q. Did you turn it on before you gave it to
10 Ms. Stemo on March 20?

11 A. No, I would have turned it off. I've got
12 probably 50 phones in that drawer.

13 Q. But you didn't turn it on to check it
14 before you gave it to her?

15 A. No. She would have -- I presume, she would
16 have had to charge it, too.

17 Q. When you put the phone in there, did it
18 have data on it?

19 A. I don't know what was on it. I didn't view
20 the phone or manipulate the phone. I wrote some
21 notes on it and threw it in the drawer, to be honest
22 with you, to recycle and utilize again in another
23 case somewhere else.

24 Q. And who did you get that phone from?

25 A. I bought it at Walmart.

1 Q. No. I'm sorry, bad question. Did Mr.
2 Sapien give you the phone during the takedown?

3 A. I'm not sure he did. He may have. We met
4 later that day at the Gold building here, is where we
5 were processing and interviewing. So somebody from
6 the Penitentiary brought it down to me.

7 Q. And gave it to you directly?

8 A. That's what I recall, yes. There were a
9 number of informants with phones, and I collected, I
10 think, all of them.

11 Q. How many meetings did you have with
12 Mr. Duran?

13 A. During the early stages, during the
14 investigation?

15 Q. From when you signed -- or when Agent
16 Brusuelas signed him up -- to, let's just say, to the
17 takedown?

18 A. My first one was in August of 2015. I
19 think I only met him maybe two other times. My
20 contact with him in person was limited.

21 Q. How would you contact him normally?

22 A. My preferred method was to go through STIU,
23 so I wasn't talking on the phone with him. But at
24 times, I would have to talk to him on the phone. At
25 times we talked on the wire phone. And at times I

1 had to text him, or he text me on the wire phone.

2 Q. You didn't like talking on the wire phone;
3 correct?

4 A. Correct.

5 Q. You said so much to him?

6 A. I probably said it on every wire phone that
7 anyone has ever called me on.

8 Q. And you said you went through STIU to talk
9 to him. Was that phone -- those calls were recorded,
10 or no?

11 A. Sometimes that was in person, because they
12 would go in there and shake those guys down. So I
13 deferred to them on how they got a message to him. I
14 also wasn't as familiar with Securus and how the
15 phones worked in the prison. So I would just relay
16 to the Captain what information needed to get to
17 whatever informant. And they would handle it.

18 Q. So you would talk to Captain Sapien, and
19 then he would relay the message to Mr. Duran or any
20 particular informant?

21 A. Yes. In his absence, maybe one of the
22 other guys. But he was my main point of contact.

23 Q. Do you have any idea how many unrecorded
24 phone calls you might have had directly with
25 Mr. Duran?

1 A. You probably want a number next?

2 Q. I do.

3 A. At least a dozen. I wouldn't be surprised
4 if it was two dozen. Especially after the arrests.
5 The phone calls increased after the takedowns.

6 Q. Did you write a 302 report or any kind of
7 memorandum regarding these phone calls with
8 Mr. Duran?

9 A. Only if there was something that I wanted
10 to capture that I thought was evidentiary, I would
11 have done a 302. Otherwise, I wouldn't have.

12 Q. And on, say, the two dozen phone calls that
13 you had, can you approximate how many reports you
14 wrote?

15 A. It wouldn't be very many. My -- I wasn't
16 seeking evidence from him in those phone
17 conversations.

18 Q. What were you seeking?

19 A. From my recollection, there were -- I had
20 to prepare him for the arrival of Mr. Baca. I had
21 to -- well, at times I had to manage him, just give
22 him some guidance.

23 Q. What kind of guidance?

24 A. The first -- the instance I'm thinking of
25 is when another informant arrived there, and I think

1 made a mistake in some of the representations he made
2 in the pod. That got to Duran. Duran suspected, and
3 correctly so, that that person was an informant. He
4 got pretty mad. So guidance in terms of just
5 managing him and telling him to stay focused, that
6 sort of stuff, which I wouldn't write a 302 on.

7 Then lastly, the phone calls increased as
8 he was closer to being granted parole or getting his
9 release from the Department of Corrections. He
10 involved me in some of those conversations.

11 Q. He was upset that he wasn't released
12 sooner; correct?

13 A. I'm sure he was.

14 Q. Let's talk a little bit about the money.
15 You paid him approximately \$45,000; correct?

16 MR. CASTELLANO: Objection, relevance.

17 THE COURT: Well, we've had some of this
18 testimony so I need a complete picture. Overruled.

19 A. I think the total sum is somewhere around
20 there. We have to break down those costs. But it's
21 fair to say that he benefited from about that much
22 money. And that would include expenses to move and
23 stuff like that, for his family to move.

24 Q. Commissary?

25 A. Commissary would be a much smaller portion

1 of that. I think the greater was that 25,000 that we
2 talked about earlier, I think with Mr. Lowry. And
3 then I remember another larger check to allow his --
4 or to enable his family to move.

5 Q. And what amount was given to Grace Duran on
6 his behalf?

7 A. I think I met with her twice at his
8 request, to give her the money instead of putting it
9 on his books. I don't know the exact amounts, but
10 I've turned over all my receipts that were generated
11 with those payments.

12 Q. Do you know if they've been disclosed to
13 the defense or not?

14 A. I'm sorry?

15 Q. Do you know if they've been disclosed to
16 the defense or not?

17 A. I never know that. My role is just to turn
18 them over to the U.S. Attorney's Office.

19 Q. So you gave Grace Duran twice -- this is
20 the younger Grace Duran, Grace Duran No. 2?

21 A. I haven't met No. 1.

22 Q. And do you remember how much money it was
23 that you left with her on each occasion?

24 A. No.

25 Q. Can you give me a ballpark?

1 A. Do you want me to look through receipts?

2 Q. Sure.

3 A. On July 25, 2016, Agent Sainato and I paid
4 her \$6,000.

5 Q. And the second payment?

6 A. I can't tell. There may not have been a
7 second one. I just know that I've met her in person
8 twice. The other time may have just been a meeting.

9 Q. Did she sign for the money?

10 A. Yes.

11 Q. May I see that receipt, Agent?

12 MS. SIRIGNANO: May I approach?

13 THE COURT: You may.

14 Q. Agent Acee, is this Ms. Duran's signature?

15 A. Yes.

16 Q. And how do we know that?

17 A. Well, what I looked for first was the one
18 that was different than all the other signatures.
19 And then I remembered that because that was the money
20 to move, that amount.

21 Q. To move from New Mexico to --

22 A. Wherever she was moving.

23 Q. -- out of state?

24 A. Yeah. It didn't matter to us.

25 Q. And she signed it "Ironman"?

1 A. Yes.

2 Q. And who is Ironman?

3 A. That's the payment name or code name for
4 Eric Duran.

5 Q. And did he choose that name?

6 A. He did. I think he did. I didn't choose
7 it.

8 MS. SIRIGNANO: Your Honor, I'd like to
9 move this in as Chris Garcia C.

10 THE COURT: Any objection, Mr. Castellano?

11 MR. CASTELLANO: Yes, Your Honor. First of
12 all, it's a copy. And second, we're continuing to
13 get away from the two motions at this point. We're
14 getting farther and farther away from either one,
15 including selected recordings. So it's irrelevant to
16 either of the motions.

17 THE COURT: Well, part of this -- I see it
18 as part of the motion on voluntariness. So I'm going
19 to admit it.

20 And so anybody else have any objection to
21 it? All right. Christopher Garcia Defendant's
22 Exhibit C will be admitted into evidence.

23 MR. CASTELLANO: Your Honor, I'd ask that
24 we make a photocopy of this exhibit and then mark it.

25 THE COURT: All right. Is that acceptable,

1 Ms. Sirignano?

2 MS. SIRIGNANO: Absolutely. I don't have
3 any problem with that. Just logistically should I
4 leave it with the Clerk?

5 THE COURT: Maybe Ms. Standridge can make a
6 copy of it and give you back -- or give Mr. Acee back
7 his original.

8 MS. SIRIGNANO: Thank you.

9 BY MS. SIRIGNANO:

10 Q. So the second meeting was when, with
11 Ms. Duran?

12 A. I think it was before I gave her that
13 money. Because I wanted to talk to her about -- I'd
14 heard from Duran on what his plans were, but I just
15 kind of wanted to verify with her that she was on
16 board with that. So I think it was before July, that
17 July date.

18 Q. Did you write a report regarding this,
19 these two meetings?

20 A. No.

21 Q. I'd just like to go back to the master text
22 file.

23 MS. SIRIGNANO: Your Honor, may I approach?

24 THE COURT: You may.

25 Q. Do you recognize this document?

1 A. Yes.

2 Q. Is this the master text file?

3 A. I think -- I believe that's what it's
4 called.

5 Q. And you referred to my filing. This was
6 Exhibit C of Document 1612; correct?

7 A. Yes.

8 Q. And this exhibit is 838 pages; correct?

9 A. Yes.

10 MS. SIRIGNANO: Your Honor, I'd like to
11 move for admission of the entire 838 pages, which I
12 don't have here in court with me right now, but it is
13 an exhibit in a reply I filed over the weekend. With
14 the Court's permission, I can get a hard copy here
15 after the hearing.

16 THE COURT: And tell me -- I have copied
17 this morning -- Ms. Standridge copied the reply.
18 What are most of those?

19 MS. SIRIGNANO: Your Honor, this is the
20 master text file that I reviewed with Mr. Acee.

21 THE COURT: So that's what it is?

22 MS. SIRIGNANO: It's all the text messages
23 from Eric Duran's phone. And there is a discrepancy
24 between the actual phone, the original evidence, and
25 the text messages that are in this master text file

1 from Verizon.

2 THE COURT: Any objection to that coming
3 in?

4 MR. CASTELLANO: Your Honor, I just wonder
5 what the relevance is as it relates to selective
6 recording or coercion, and where the discrepancy is
7 between the two, before they move its admission.

8 THE COURT: Well, I think I see the
9 relevance to both of the motions, so I'm going to
10 admit it. It seems that it's already been in the
11 court record here, and we've had discussions about it
12 during the day.

13 So is there any objection from anybody
14 else?

15 Did you have anything, Mr. Lowry?

16 MR. LOWRY: No, Your Honor. I can explain
17 the relevance, but I think it's a moot point given
18 the Court's ruling.

19 THE COURT: All right. So Christopher
20 Garcia Defendant's Exhibit D will be admitted into
21 evidence.

22 MS. SIRIGNANO: Thank you, Your Honor. And
23 this is just page 1, and I've marked it D as a
24 placeholder. And I will provide the Court with the
25 remaining pages in the morning.

1 MR. LOWRY: Your Honor, can I have a brief
2 housekeeping matter?

3 THE COURT: You may.

4 MR. LOWRY: I think the Court would find it
5 more beneficial to have that electronically versus on
6 a CD or a thumb drive, OCR'd so you can search it
7 more quickly.

8 THE COURT: I don't have any problem if
9 nobody objects. Mr. Castellano is shaking his head
10 no.

11 Anybody else? All right. So if you want
12 to provide it in that form, that will be fine as
13 well, Ms. Sirignano.

14 MS. SIRIGNANO: Thank you, Your Honor.

15 Q. You mentioned the wire room at the FBI, and
16 a delay in receiving text messages or calls; correct?

17 A. I think there is a delay.

18 Q. Did you have a monitor in your wire room
19 regarding this phone?

20 A. No -- like a full-time monitor?

21 Q. Yes.

22 A. No.

23 Q. Was there a part-time monitor?

24 A. An agent was assigned to review it on, I
25 guess, a part-time basis, among other tasks.

1 Q. Who was that?

2 A. It was Agent Sainato. And then I think it
3 later changed to Agent Neale.

4 Q. This phone was being used every day by
5 Mr. Duran; correct?

6 A. I don't know if it was used every day.

7 Q. Most days?

8 A. I think so.

9 Q. Was Agent Sainato or Agent Neale monitoring
10 this phone at least every other day?

11 A. It just depended. I placed the priority on
12 the operation we were doing on the street. So if I
13 needed them for operations on the street, then they
14 would have to get back to reviewing this. So it kind
15 of depended what the week looked like. But this was
16 on their "to do list."

17 Q. Do you know if weeks went by without the
18 texts or the phone calls being monitored?

19 A. I think they were pretty good about getting
20 in there. And I think they got in there at least
21 weekly.

22 Q. Did they write reports regarding their
23 review of the texts or the phone calls?

24 A. Yes. In fact, Mr. Lowry presented one
25 earlier today with the bullet points. That one was

1 by Agent Sainato.

2 Q. So at some point in time, the FBI became
3 aware that Mr. Duran's girlfriend, Felicia, was
4 sending sexy photos and videos of herself to him;
5 correct?

6 A. I think today is the first time I heard
7 that name. I have talked to Duran about that, yes,
8 but if you'd give me a timeframe, I might be able to
9 answer a little bit better.

10 Q. Well, was it another girl that was sending
11 these videos?

12 A. I wasn't aware of any videos being sent. I
13 understand there was an exchange of photos. And I
14 think in a couple of cases Mr. Baca introduced Duran
15 to some women. I'm not sure how that introduction
16 took place. But there was some photo exchanges
17 there.

18 And at the time I was using Mr. Duran to
19 also broker deals on the street between undercover
20 FBI agents and people selling drugs in places in New
21 Mexico. He may have sent selfies to at least one of
22 those people, to kind of show how he's doing, what he
23 looks like now. I'm only aware of that, though,
24 through what I've heard in court, and prior to that,
25 what Duran told me.

1 Q. What Duran told you about receiving sexy
2 photos from women?

3 A. No, he didn't tell me that. He -- at some
4 point in time, he told me that he had sent some
5 photos, and was texting with someone related to Chris
6 Garcia and someone related to Anthony Baca. My
7 interest was more in who are those people, and are
8 those people we're doing buys from, or are you just
9 talking to women? If he was just talking to women,
10 and it didn't involve us buying drugs or guns, or
11 something like that from them, I wasn't as concerned
12 who they were.

13 Q. And that's because they weren't targets?

14 A. Those people -- I think one of them might
15 have gotten a target letter, but we didn't arrest
16 them.

17 MS. SIRIGNANO: May I have a moment, Your
18 Honor?

19 THE COURT: You may.

20 MS. SIRIGNANO: Pass the witness, please.

21 THE COURT: Thank you, Ms. Sirignano.

22 Mr. Villa, do you have cross-examination of
23 Mr. Acee?

24 MR. VILLA: Thank you, Your Honor.
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EXAMINATION

BY MR. VILLA:

Q. Good afternoon, Agent Acee.

A. Good afternoon.

Q. Okay. So I want to go back just to make sure I've got this understood on the recordings that Mr. Duran made of Timothy Martinez.

You believe that he did make a recording that -- I think you testified with Mr. Lowry you saw on a tablet?

A. No, I have not looked through anyone's tablet. But different defendants will tell me what's on the tablet. That one stuck out to me because it's among some of the recordings that really shouldn't be on there. They're from a different gang, from a different case. And I believe there is one recording of Timothy Martinez in there with a guy that the defendants will know as Pete, or Pite.

Q. That was made by Eric Duran?

A. Yes.

Q. But you're saying that's for a different case?

A. No, sir. What I'm saying is -- I'm sorry if I'm not explaining it well -- but the device that Duran used was a device that I used on a different

1 gang case. And what happened was, Agent Brusuelas
2 must have checked that device out before it was
3 downloaded, or STIU took it from my case targeting a
4 gang, the Sureno/Mexican Mafia Gang, and gave that
5 device to Duran, who then used it on a number of
6 people in the SNM case. It's simply a device just
7 crossing cases in the same facility.

8 Q. Okay. But in any case, the recording of
9 Timothy Martinez is pertinent to this case?

10 A. Yes.

11 Q. And the recording was a discussion of the
12 Molina murder?

13 A. It's been a while since I've listened to
14 it. But there were some aspects of that in there,
15 yes.

16 Q. And I know you're not responsible for
17 disclosures, but you do believe that that recording
18 was properly captured on your end and provided to the
19 U.S. Attorney's Office?

20 A. I do, simply by the fact, I mean, the
21 defendants would have no other way to tell me --
22 recite to me what was in those recordings. They're
23 claiming they're in the tablet.

24 Q. So defendants in this case told you they
25 saw them in the tablet?

1 A. They listened to them, yes.

2 Q. That being cooperating defendants?

3 A. Yes.

4 Q. Who told you that?

5 A. Most recently, Mario Rodriguez; Timothy has
6 told me that, Timothy Martinez; Roy Martinez; Rob
7 Martinez.

8 Q. So they told you, but they didn't actually
9 play it for you on the tablet?

10 A. No. I stay away from the tablets. If they
11 have them, I don't look at them, I don't listen to
12 them.

13 Q. Now, you testified earlier about an
14 informant that was in the pod that Duran had actually
15 suspected of being an informant; is that right?

16 A. Yes.

17 Q. When was this timeframe?

18 A. I think Mr. Lowry has it in some of his
19 documents that he's shown me. But it would have been
20 before Mr. Baca came back, so I think it would have
21 been early October 2015, late September of 2015.

22 Q. Is this when Mr. Duran was in Q pod?

23 A. I'm not sure. I'll be honest with you, at
24 that time, my knowledge of the pods and the system at
25 PNM is not what it is today. So I'm not sure.

1 Q. All right. Who was this informant?

2 A. Tomas Clark.

3 Q. Did Eric Duran record Tomas Clark?

4 A. No, I don't think so. I think they were on
5 different levels in the facility.

6 Q. Did he record Billy Cordova?

7 A. No, I don't believe so.

8 Q. Now, a little earlier you testified about
9 Grace Duran, and I'm talking about No. 2, that she
10 and Mr. Duran were married; true?

11 A. Yes.

12 Q. Isn't it true that they were divorced May
13 9, 2014?

14 A. I'm not aware of that.

15 Q. I mean, if there was a court record
16 reflecting that, would you have any reason to dispute
17 it?

18 A. No, sir.

19 Q. Do you have any reason to believe that
20 since that divorce, there was any sort of formal
21 remarriage, if that's the right word?

22 A. I don't know. I thought they were married.

23 Q. And that's based on what he's told you?

24 A. As well as her.

25 Q. Both of them?

1 A. Yes.

2 Q. But you're not familiar with legal
3 documents and that sort of thing?

4 A. I haven't reviewed any of those, no.

5 MR. VILLA: May I have a moment?

6 THE COURT: You may.

7 MR. VILLA: That's all the questions, Your
8 Honor.

9 THE COURT: Thank you, Mr. Villa.

10 Any other defendant have cross-examination
11 of Mr. Acee on these two motions?

12 All right. Mr. Castellano, do you have
13 redirect of Mr. Acee?

14 MR. CASTELLANO: Yes, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. CASTELLANO:

17 Q. Agent Acee, I'm showing you Chris Garcia's
18 Exhibit A, and you may or may not know the answer to
19 this question, but do you see up here where it says
20 "Contents," and it says "texts, 7"?

21 A. Yes.

22 Q. But there are four texts below?

23 A. Yes.

24 Q. Do you know what that means, or why it
25 has -- shows seven texts in one area and four texts

1 in another?

2 A. No.

3 Q. There is an indication on what's labeled as
4 page 3 of 5 of the same exhibit. Do you know or
5 recognize the number -- because it indicates the
6 texts that are shown there are all incoming texts?

7 A. Correct.

8 Q. Do you know -- do you recognize either of
9 these two phone numbers?

10 A. Not off of the top of my head, no.

11 Q. Chris Garcia D, which is a summary of the
12 text messages, how did these come into existence?

13 A. These are generated as a result of the
14 court order we got to intercept Duran's contraband
15 phone, prison phone.

16 Q. Is it your opinion that certain things may
17 not have been captured because they were limited by
18 the court order in this case?

19 A. Yes.

20 Q. What types of things do you think were not
21 captured as a result of the limitations by the court
22 order?

23 A. Internet traffic, email. I know now that
24 the photographs weren't captured that would have been
25 sent over text.

1 Q. Tell us about this phone that you gave to
2 Mr. Duran, that you bought at Walmart. What type of
3 phone was it?

4 A. It was a Verizon flip-phone. And I think
5 it cost 19.99. It was a small phone. It was what I
6 believed would -- and was similar to the phones that
7 are utilized in the prison.

8 Q. Now, were you aware of the phone's
9 capacity?

10 A. No.

11 Q. And by that, do you know if this was one of
12 those phones that only holds so many text messages
13 before new ones bump off the old ones?

14 A. I don't know that.

15 Q. And do you know what happens to the phone
16 once it loses power and loses its charge, for
17 example?

18 A. No.

19 Q. So when you gave the phone to Agent Stemo,
20 were you aware of whether or not it had to be charged
21 before she could do the Cellebrite report?

22 A. I think it did. Because I gave her a
23 charger. In my experience, all the phones that we
24 have in our drawer, that we use for purposes like
25 this are dead. They all need to be charged.

1 Q. Are you aware of any other limitations on
2 the phone or the cellular service, in terms of how
3 long text messages were maintained on the phone?

4 A. No.

5 Q. Now, you talked about some of the
6 recordings. And so you mentioned that you like to
7 get the corroboration, if you can; is that correct?

8 A. Yes, sir.

9 Q. So, for example, if you have a recording
10 that starts in the middle of a sentence and ends in
11 the middle of a sentence, where some pieces might be
12 missing, would you like to have other things that
13 fill in the blanks, possibly?

14 A. Yes, sir.

15 Q. So I'm going to show you just a summary
16 from call 10. There is already in evidence the
17 transcript. But there is a discussion here of the
18 CHS talking to Mr. Baca about a willa, or a message,
19 talking about how much Mr. Baca hated Santistevan.

20 A. Yes.

21 Q. Now, this is in October of --

22 THE COURT: Let me ask you this: Do you
23 want to take this up and finish it tomorrow so you're
24 not rushed trying to finish it up today?

25 MR. CASTELLANO: I do have more, so we

1 could finish it tomorrow.

2 THE COURT: Why don't we do that.

3 One thing I wanted to say before we leave,
4 I told you I was working on these James motions.
5 Probably the place that I think that I -- where I'm
6 coming out is I'm inclined to think that, as I
7 indicated, that I think some of these statements by
8 the defendants can only be used against them, are not
9 exceptions -- they're not hearsay under the rules,
10 and that's what I indicated on the last day before
11 the holidays, that that was where I was coming out.
12 I think under Bruton, I probably cannot give
13 instructions that clarify the -- just a limiting
14 instruction, and that satisfied the Bruton problem.
15 But I think Smalls indicates that that is not a
16 Bruton problem. So I think I don't have a
17 constitutional issue. So I'm inclined to think that
18 just on a hearsay issue, I can give the jury a
19 limiting instruction, and expect them to follow it.

20 So y'all might, in your studies, be
21 focusing on that. But I'm inclined to think that I
22 can give a limiting instruction and tell them this
23 evidence can only be used against this defendant.
24 That would not probably be permissible under Bruton.
25 But since there is no Bruton problems, it is going to

1 be satisfactory for the federal rules of evidence.

2 So that's where I'm coming out.

3 So -- nope, nope -- I told you where I'm
4 looking. I still haven't gotten anything from
5 anybody after three weeks, so we're not going to
6 delay it today. But that's where I am. All right.
7 See y'all tomorrow. Have a good evening.

8 (The Court stood in recess.)
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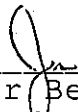
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UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages constitute
a true transcript of proceedings had before the said
Court, held in the District of New Mexico, in the
matter therein stated.

In testimony whereof, I have hereunto set my
hand on January 15, 2018.



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